TRANSACTION COSTS AND RURAL ECONOMY IN SOUTHERN ENGLAND, c.1780–c.1840

by

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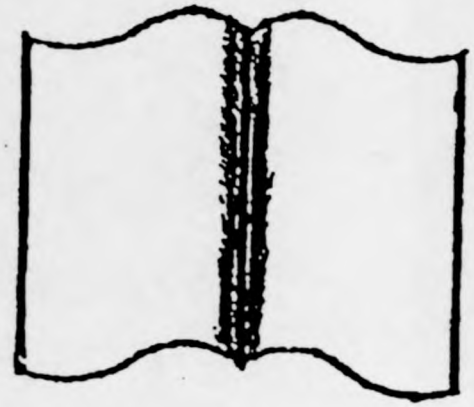

'TRANSACTION COSTS AND RURAL ECONOMY IN SOUTHERN ENGLAND, c.1780-c.1840'

By Mark A. Gray, Emmanuel College, University of Cambridge.

This dissertation utilises a method of studying economic organisation developed by industrial economists to explain significant change in the institutions of rural England in late eighteenth and early nineteenth centuries. After a detailed discussion of the development of historical economics as institutional history, it illustrates the principles of a new historical economics of institutional change based upon the analysis of 'property rights' and 'transaction costs'. Drawing upon the extensive literature in which transaction cost methods have been discussed by economists, the dissertation aims to provide the first thoroughoing and comprehensive account of this form of economic analysis for the historian.

In the more substantial second and succeeding parts of the dissertation this analytical framework is used to suggest - although absolute proof of conjectures framed by theory cannot be offered - that rational 'transaction-cost-minimising' motives may account for the institutional changes observed during the period. Using sources from over thirty archives, we investigate property rights and legal changes in the ownership of markets; the legal evolution of a more efficient law of contract, devised to help rural contractors make simple transactions; the development of novel forms of lease contract for land by legal and institutional evolution; and the development of 'privatised' forms of market transaction supervision. These institutional changes are regarded as successful or unsuccessful attempts to reduce transaction costs. Finally, the thesis places the tentative conclusions reached in the context of the later business history of the firm and corporation and argues for a detailed study of the business history of pre-firm institutions.

C O N T E N T S

PREFACE

This study was undertaken at Emmanuel College, University of Cambridge, under an ESRC postgraduate award from October 1983 to September 1986, and was completed at the Department of Economics, Heriot-Watt University, Edinburgh, where I was appointed to a full-time Lectureship in Economics and Economic History in 1986 and in the Department of Economic and Social History, University of Edinburgh, where I was appointed to a part-time Temporary Lectureship in Economic History from October 1988. After initial submission and examination it was revised *after full and detailed consultation* with my supervisor - the current text including a substantial amount of emendations and changes made to accord with the wishes of the examiners. This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration with others.

This essay is a somewhat impressionistic attempt to deal with organisational change in late Georgian England and as such does not claim to be a comprehensive treatment of the subject. Rather in territory that is, by definition, novel and experimental the attempt has been made to establish the pattern of change over a long period (1780-1840) in the hope that more detailed work will follow which will enable economic historians to put flesh upon the bare bones given here. Equally important is the presentation of a novel and I hope comprehensive approach to the problem of identifying 'transaction costs' in the continuum of equilibrium costs used by economists. Particular novelties of this work deserve to be recognized. Part I consists of the first and, to my knowledge, only attempted systhesis by an economist or economic historian of the entire literature of transaction costs and property rights. Chapter 5 represents the first attempt to use archival materials to understand a little reported

transition in the nature of market transactions and property rights and Part 3 extends the already well known and valuable work of Professor Atiyah and others on the 'revolution in contract' into new areas. Part 4 offers the first, though again far from comprehensive, treatment in the transformation of the policing of contract during the late Georgian age, although it does not claim to deal with other forms of rural policing during the period.

Bibliographic history of the text

Several sections of this essay have appeared in other places and in other forms. These opportunities to present early versions of chapters or parts of chapters were particularly valuable and deserve to be recorded here. The material deployed in Part 1 appeared in several earlier guises : as a paper entitled 'Transaction Costs, the Coase theorem and the Study of Economic History' prepared for discussion at the Department of Jurisprudence, European University Institute, Florence in June 1987; as a part of my contribution to a joint research programme with Romano Dyerson of the Department of Economics, Heriot-Watt University and appearing as a discussion paper entitled 'Metacritique of the economics of property rights : the philosophical and economic foundations of historical evolution' in the same department in May 1988; as tutorial material used in teaching for my Advanced Microeconomics course at the Department of Economics, Heriot-Watt University during 1986-87 and in lectures for my intermediate microeconomics course (second year) delivered at the same institution in the academic session 1986-87; and as a paper entitled 'Property rights and transaction costs in rural southern England, c.1780-1840' given at the Economic History Society conference at Norwich in April 1988.

The substance of Chapter 5 was given as a seminar paper entitled 'Markets and Hierarchies in Eighteenth and Nineteenth Century England' at St.Antony's College, Oxford University in March 1989. The substance of Chapter 6 was first given as a seminar paper entitled 'Transaction costs and the history of the law of contract in England, c.1750 - 1850 ' at the Centre for Socio-Legal Studies, Wolfson College, University of Oxford in March 1987 and subsequently appeared under the same title as a Working Paper (87-03), Department of Economics, Heriot-Watt University.

Revisions of the text have included - a thorough reworking of the awkward early pages (and some of the later pages) of Chapter 2, the removal of mathematical and geometric material in Chapters 1-3, the resulting reduction of material in the first three chapters (although the number of pages remains the same), the introduction of new material in early chapters and throughout reflecting the limitations of the model adopted here and limiting the claims made as a result, the introduction of definitions for a number of complex technical legal terms such as 'exclusive jurisdiction' which might otherwise have proved difficult to understand, and a more coherent explanation of the place of the jurisprudential arguments used in Chapter 6. The intention throughout the revision has been to remove as little of the original text as possible and to avoid radical surgery where possible with the intention of preserving the harmony of the text.

Acknowledgements

It is impossible sufficiently to repay the cogent advice freely given by colleagues in Cambridge and Edinburgh in aid of the current essay.

Equally, the staff of the National Register of Archives, London; Cambridge University Library; the Squire Law Library, University of Cambridge; the Signet Library, Edinburgh; The Advocates Library, Edinburgh; Heriot-Watt University Library, Edinburgh; Edinburgh University Library; the National Library of Scotland, Edinburgh; the Seeley Library, University of Cambridge and numerous local libraries and local studies centres across southern England from Truro, Swindon and Salisbury in the West to Ipswich and Bedford in the East cannot be thanked as extensively as I would have liked. Individual scholars both in Cambridge and in Edinburgh (and elsewhere) have given support, advice, information or comments on drafts : in particular, I want to record my thanks to Stephen Burnell, Anne La Forest, Jay Winter, and to my supervisor, Barry Supple - all in Cambridge in 1983-6. In Edinburgh I gained much from talking with Paul Hare, Neil Kay, Drew Scott and Geoff Wyatt at Heriot-Watt University and from discussions with Michael Anderson, Ian Blanchard, Martin Chick, Roger Davidson and Stana Nanadic at the University of Edinburgh and with others in central Scotland. Of other scholars whose comments on earlier work has been a valuable source of critical aid in this enterprise, I would like to mention in particular Paul Fenn of Wolfson College, Oxford; James Foreman-Peck of Newcastle University; Lee Alston of Williams College, Massachusetts; Douglass North of the University of Washington; Charles Feinstein, University of Oxford; Patrick O'Brien, University of Oxford and Bill Knox of St.Andrews University. Bill Knox, Nick von Tunzelmann, Michael Sanderson, Paul Hare, Patrick O'Brien and Terry Gourvish helped to arrange valuable opportunities for exposure of this work at the conferences and seminars in various locations throughout Britain mentioned above. The insightful comments of my

students in Edinburgh provided some valuable indication of the need for some thoroughgoing and comprehensive survey and exposition of the theory of transaction costs and property rights such as that undertaken in the first chapters and both Heriot-Watt and Edinburgh advanced students in economics and economic history proved useful initial 'sounding boards' for my ideas in this respect. Romano Dyerson, Sarah Cooper and other graduate students in Edinburgh who were also, though independently, pursuing work in the general area of applied transaction cost analysis helped me to clarify my thoughts. Finally my parents offered that support, advice and encouragement which most recent reports insist is essential for the completion of doctoral work; without them this thesis would not have reached a conclusion.

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A B B R E V I A T I O N S

The following abbreviations are adopted throughout the text. For the sake of convenience journal titles have been cited fully in footnotes and only sources contemporary with the period under study, associated materials and manuscripts and other ephemeral items are referenced using the following conventions. Where a repository is located at more than one site, I have indicated the location of the particular source for the greater convenience of readers and other scholars. I have not troubled to indicate the source of contemporary newspapers and other like publications where collections other than the BL Colindale collection have been used. I have taken the further liberty of referring to all county repositories as 'Record Offices' and not as 'County Record Offices' to save space.

Notes on legal citation

In citing cases at common law, I have referred readers to the most commonly used collection of all case books of the period, namely the English Reports edited by Pollock and others during the first thirty or so years of the present century. However, whilst I have adopted current legal citation practice with respect to the volume number of the Reports, placing it before the abbreviation ER, I have thought it better to refer to the whole text of the case concerned rather than to it's first page. Thus references are to Weld v.Southern Railway Co. (1862) 55 ER 133-135 and not to 55 ER 133. I have nevertheless reserved legal practice in citing from

reports using the word 'at' instead of a colon as in the rest of the text. Further, and in conformity with legal practice, I have refered to decisions of courts as 'judgments' and not as 'judgements' to distinguish the rules of the courts from mere opinions.

B.L.	British Library, London.
Beds. R.O.	Bedfordshire Record Office, Bedford.
Berks. R.O.	Berkshire Record Office, Reading.
Bath P.L.	Bath Public Library, Queen Square Library, Bath.
BPP	[British] Parliamentary Papers, [Sessions 1800-1900]
Bristol R.L.	Bristol Reference Library, College Green site,Bristol.
Bucks. R.O.	Buckinghamshire Record Office, Aylesbury.
CUL	Cambridge University Library, Cambridge.
Cambs. R.O.	Cambridgeshire Record Office, Cambridge.
Devon R.O.	Devonshire Record Office, Exeter.
Dorset R.O.	Dorset Record Office, Dorchester.
Essex R.O.	Essex Record Office, Chelmsford.
ER	English Reports ed.Frederick Pollock et al. (London 1921-), 173 volumes.
Gloucs. R.O.	Gloucestershire Record Office, Gloucester.
Hants. R.O.	Hampshire Record Office, Winchester.
H.C.Journal	Journal of the House of Commons
H.L.Journal	Journal of the House of Lords
HCP	House of Commons Sessional Papers of the Eighteenth Century ed. Sheila Lambert (New York,1975-)
HC Repts	Reports...of the House of Commons First series 1785-1799.
Herts. R.O.	Hertfordshire Record Office, Hertford.
Hunts. R.O.	Huntingdonshire Record Office, Huntingdon.

Kent A.O.	Kent Archives Office, Maidstone.
N.Devon A.Lib.	North Devon Atheneum Library, Barnstaple.
Norfolk R.O.	Norfolk Record Office, Norwich.
Oxford R.O.	Oxfordshire Record Office, Oxford.
PRO (CL)	Public Record Office, Chancery Lane, London.
PRO (Kew)	Public Record Office, Kew, Surrey.
R.C.	Royal Commission.
'RC on Markets'	'First Report of the Royal Commission on Market Rights and Tolls...' BPP Sess.1888, 53 (C-5550) [3 volumes].
R.I. Corn.	Library of the Royal Institution of Cornwall, Truro.
S.C.	Select Committee of the House of Commons or Lords.
Scott. R.O.	Scottish Record Office, Edinburgh.
Sess.	session of Parliament.
Som. R.O.	Somerset Record Office, Taunton.
Suffolk R.O.(Bury)	Suffolk Record Office, Bury St. Edmunds.
Suffolk R.O.(Ips.)	Suffolk Record Office, Ipswich.
Surrey R.O.	Surrey Record Office, Kingston-upon-Thames.
Sussex R.O.(C)	Sussex Record Office, Chichester.
Sussex R.O.(A)	Sussex Record Office, Arundel.
Swindon LSL	Swindon Local Studies Library, Swindon.
VCH	Victoria History of the Counties of England (London,1899-)
Wilts. LSL	Wiltshire Local Studies Library,Trowbridge and Salisbury.
Wilts. R.O.	Wiltshire Record Office, Trowbridge.
Worcs. R.O.	Worcestershire Record Office, Worcester.

INTRODUCTION: ON THE HISTORICAL ECONOMICS OF INSTITUTIONS

> 'The controversy between the 'historical' and the 'Ricardian' school, between the advocates of the 'new' and the 'old' method, as they are often distinguished, with some inaccuracy, is closed by a mutual admission that there is room for both in the wide region of economic inquiry...A knowledge of the principles of economics, as expounded by Ricardo, and his more liberal and instructed successors, will improve the intellectual equipment of the economic historian; an acquaintance with the results of historical research is no less indispensable to the ordinary economist who wishes to be abreast of his subject.' [L.L.Price, 1900].

This essay seeks to provide a novel foundation for historical economic study using very well established principles of methodology and a little economic theory. As such its purpose is two-fold: first, to provide a sound theoretical and analytical framework for the study of the type of problems economic historians encounter when studying qualitative, institutional, economic change and, secondly, to investigate a particular problem in the economic history of the eighteenth and nineteenth centuries, namely how pure market economy declined and alternative hierarchies emerged, the problem of the 'business history of the market'. We shall be seeking to explain how it came to be that the older forms of market organisation were replaced by alternative 'hierarchies'. These two interconnected tasks have come to dominate much recent historiography, and their co-existence suggests that unreconstructed neoclassical economic theory does not provide a sure foundation for economic historical study. Consequently, this essay is at once a critical and a practical contribution to economic historiography: having offered a detailed exposition and critique of contrasting approaches to one variety of institutional economic history, it proceeds to the application of this methodology to a particular

historiographical problem. Whilst the exposition of current methodological approaches is relatively brief in comparison with the lengthier historical study, the importance of the former to the whole study should be apparent to the reader. A more detailed exposition of the general methodological problems of institutional economic history appears in other published work undertaken concurrently with this study [1].

The problem to which this essay addresses itself is primarily non-quantitative. It is perhaps the most challenging of modern economic historiographical problems and certainly that most central to the development of the discipline of economic history since the nineteenth century. From the earliest years of the subject organisational change in the economy has featured as a central element in historians' studies of the economic past. From Rau and Hildebrandt in the mid-nineteenth century, historical economic studies were principally concerned with the causes and consequences of organisational and institutional change in the economy. Through the German historical economist Roscher and later Schmoller British economic historians also began to recognise the central importance of institutional and constitutional change in economic development [2], and

[1] See in particular 'Theory and History in the Economic History of Britain' Scottish Journal of Political Economy 35, 1, 1988, 92-96; 'Transaction costs and the history of the law of contract in England,1750-1850' Department of Economics, Heriot-Watt University, Working Paper 86/7-03 (1987); 'Transaction costs, the Coase theorem and the study of economic history' (mimeo) Faculty of Jurisprudence, European University Institute, Florence, June 1987 and discussion paper, Heriot-Watt University; 'Property rights and transaction costs in rural southern England', Paper given to the Economic History Society Conference, Norwich, April, 1988.

[2] William Cunningham The Progress of Capitalism in England (Cambridge, 1916), 14-16.

through Schmoller in particular British economic historians like Ashley, Cunningham and Seebohm first appreciated that institutional 'historical economics' allowed one 'to be an economist without ceasing to be an historian' [1]. This 'historical economic' approach, now much discredited in Britain, provides the groundwork for the methodology developed in this essay. It is, in fact, an attempt to make use of the pragmatic institutionalism of the German school alongside the precision of analysis of the generic neoclassical economic theory of institutions in order to explain an outstanding problem of the 'Methodenstreit' era, namely the emergence of new institutional structures and the decline of old ones in the course of the eighteenth and nineteenth centuries. The general theme of the essay may be summarised in terms familiar to historians from the late nineteenth century to the present as the economic history of efficient and workable institutions in one modern market economy. We question the foundations of the presumption, common in economic analysis and increasingly common among economic historians, that the almost permanent revolution in organisational form which is arguably the most important characteristic of the modern economy is the consequence of rational, goal directed, behaviour by individuals seeking to maximise their own happiness. We shall also question whether inefficient allocations of private rights can be swiftly and expeditiously swept away and whether the 'invisible hand' of the market always 'knows' best and has performed with uniform

[1] J.F.Rees 'Recent Trends in Economic History' History 43, 120, (1949), pp. 1. See further N.B.Harte 'The Making of Economic History' in N.B.Harte (ed) The Study of Economic History (London,1971);D.C.Coleman History and the Economic Past: An Account of the Rise and Decline of Economic History in Britain (Oxford,1987) Chp.4.; Gerard M. Koot English historical economics, 1870-1926: the rise of economic history and neomercantilism (Cambridge,1987); Jurgen Kuczynski Zur Geschicte der Wirtschaftsgeschichtsschreibung (Berlin,1978), pp. 30 ff.

effectiveness in recent centuries in allocating private property rights. Above all we shall be concerned with the specific problem of discovering how efficient the forms of policing, enforcement, surveillance and control over property rights were in the rural world in the years 1780 to 1840 in terms of their welfare implications; this specific problem we shall regard as a branch of the general historical theme of organisational change during the century and a half after 1750.

For the British economic historians of the late nineteenth century, this latter theme disguised a pressing economic problem, for, as Cunningham explained, 'The days of the supremacy of the nation as the unit of economic regulation seem[ed] to be passing away, as civic economic institutions and intermunicipal commerce have been merged...'[1]; the era of 'order, security and uniformity', as Keynes retrospectively described it [2], had arrived. The geo-politically broadened organisational basis of the economic regulation of trade, commerce and production required a new form of economic analysis which abstracted the characteristics of the market analysis of contemporary neoclassical and Walrasian theory and applied them to the study of firms, industries, trades unions, cooperatives, even the state itself. Similarly, the economic analysis of the creation of economic institutions and of their demise and replacement by other institutional forms required the generalisation of the political economists' theories of how the Smithian 'invisible hand' operated. Very little of even the most

[1] William Cunningham The Growth of English Industry and Commerce in Modern Times (3 vols. Cambridge,1917), 3, 871.

[2] John Maynard Keynes The Economic Consequences of the Peace (London, 1919), 13.

controversial economic history written in late nineteenth century Britain ignored either the usefulness of the Mill-Fawcett-Marshall paradigm in analysing economic behaviour in market terms or the central importance of organisational change in the historical process.

Certainly well known and still rehearsed controversy surrounded the British historical economists' attitudes toward contemporary economic theory (Thorold Rogers' characterisation of political economy as 'highly artificial' was perhaps the most extreme case of a common reaction to the limitations of Millian economics [1]) but in general it should be recognised that almost all of these historians were aware of the usefulness of economic theory as a part of any analytical study of the development of organisation. In Britain, and indeed in Germany, the debate we label the 'Methodenstreit' was neither singularly nor even substantially philosophical; rarely, in fact, did British economic historians consider the choice between 'inductive' and 'deductive' method to be as important in economic science as both Mill and Whewell had done, for example. We might characterise their view of economic theory as being broadly supportive of partial equilibrium analysis but warily skeptical of the application of such analysis to the process of economic change itself; one might, indeed, characterise British historical economics from the eighteen-nineties as the protest of the historian at the feebleness of economists' dynamic theories. Economists certainly recognised the significance of contemporary global institutional change (Marshall even deemed the study of it to be

[1] James E.Thorold Rogers The Economic Interpretation of History (London, 1888), vi.

'absolutely essential to the economist'[1]) but reacted strongly to the historical economists' desire that historical method be made the foundation of a truly developmental, dynamic theory of institutional adaptation.

This essay may be regarded as a latter-day exercise in that variety of institutional historical economics which flourished at the turn of the present century, not because the same pressing contemporary problem of institutional adaptation forces historians' attention toward institutional problems, but rather because without an historical account of institutional change in opposition to that offered by neoclassical theory and behavioural theories of economic action (which treat organisations as if they were individuals with singular behavioural motivations and knowledge) all historical institutions, including law and social organisation, will continue to be regarded as rational maximising entities at all times and in all places. The implication of such a view of the economic past is fundamentally anti-historical; it suggests that institutional economic evolution possesses a logic rather than a history. In the place of neoclassical method we shall develop an alternative approach to the historical economic study of institutional change in which the relatively novel property rights and transaction cost (PRTC) approach will play a key role. Indeed, this work asserts that PRTC economics provides the most appropriate framework for the analysis of organisational change in history

[1] Alfred Marshall in Cambridge University Reporter 33,no.37, May 14 1903, 772. Marshall certainly encouraged the partial equilibrium analysis of international and national institutions (e.g.'[Review of] Mathematical Psychics...by F.Y.Edgeworth' Academy, 19, (1881), 457 col 3.) but also recognised the very separate problems associated with dynamic theorizing concerning institutional change (e.g. Marshall to J.B.Clark, 15 December 1902 in A.C.Pigou (ed) Memorials of Alfred Marshall (London,1925), 415).

and that it properly belongs to the historical economic approach of late nineteenth century economic historians.

In the first three chapters of this essay, a detailed outline of the economic theory of property rights offers a definition of economic institutions as 'transaction cost economising' organisations made up of individuals whose common interests bind them together and to the rules decided collectively. Here we need only note that it is possible to take a pragmatic and a judicious view of the notion of this economising function thereby preventing the intrusion of unwarranted neoclassical behavioural assumptions into historical study. In the subsequent chapters a theory of organisational change and adaptation will be introduced with the intention of providing a framework for the analysis of historical change in the course of the late eighteenth and early nineteenth century in the rural south of England. At that point it will prove essential to understand both the development of the notion of transaction costs and the source of significant misunderstanding about the use of PRTC theory in modern economic theory and in economic history. Here, however, the principles of pragmatic, theoretically informed, historical economic method must be established.

Historical economics, according to one of the leading nineteenth century practitioners, consists simply of the reduction of abstraction in economic thought [1]. For most of the historical economists of the later nineteenth century, indeed, 'abstraction' in the form of Marx's surplus value model

[1] Gustav Schmoller, Max Lenz and Erich Marks Zu Bismarks Gedachtnis (Leipzig,1899), 60-62.

incorporating dated labour or Bohm-Bawerk's capital theory, prevented the application of the economic theory developed over the previous century to historical or developmental problems. Of all forms of abstraction the most important, the analysis of markets and market behaviour, predisposed economists to analyse competitive forces as the outcome of rational self-directed behaviour; in reality, suggested Schulze-Gaevernitz among others, the process of change itself involved significant 'mental' change - notably in the 'means of motivation' ('motivationsweise') - in which the actions of economic agents would remain rational relative to their situation [1]. Thus 'motivationsweise' sat uneasily with a faith in the economic analysis of the classical economists and, for Schmoller at least, was nearly obscured by it [2]. Nevertheless, as von Bulow pointed out in 1904 [3], for almost all of the younger German historical economists of the nineteenth century the apparently romantic attachment to free trade principle which characterised their understanding of classical theory failed to impair the development of a broad but fragmentary 'theory' of human motivation based upon the categorical study of behavioral patterns. Naturally these behavioural categories were selected according to the historical theme selected for analysis. The basic categories ('grundkategorien') of historical behaviour Schulze-Gaevernitz, the historian of the political

[1] Gerhardt von Schulze-Gaevernitz Thomas Carlyles Welt- und Gesellschafts -anschauung (Dresden,1893), 77. On the role of 'motivationsweise' in the historical economists' critique of classical economics in general, see Joseph Schumpeter History of Economic Analysis (New York,1954),pp.807ff. and Eric Roll A History of Economic Thought (London,1961), 309.

[2] Matti Viikari Die Krise der 'Historistischen' Geschictsschreibung und die Geschictsmethodologie Karl Lamprechts (Helsinki,1977), 118-9.

[3] Georg von Bulow 'Zur wirdigung der Historischen Schule der Nationaloekonomie' Zeitschrift fur Sozialwissenschaft, 7 (1904), 103.

economy of the state, was principally concerned with, for example, were 'egoism' and 'loyalty'. This 'mental side' [1] of economic change remained an important feature of historical institutional economics during the late nineteenth and early twentieth century. However, in the course of the 'Methodenstreit', 'motivationsweise' and organisation became increasingly interconnected and, eventually, the one blended with the other [2]. The 'grundkategorien' of change on the 'mental side' were now represented as being socio-political expressions of the 'motivation' toward collectivity or individualism and, in Weber and Sombart in particular, the whole historical theory of institutional change became essentially sociological.

The problem that the Weberian and Sombartian analysis posed for historical economics was that so often the motivation for collective or individual social and economic forms of organisation did not appear rational; in other words, the post-Methodenstreit sociological theories of economic development did not require a theory of human action or conduct [3]. One consequence of this was that it became impossible to explain organisational change using any other categories than those of contemporary sociology. The fundamental forms of economy first identified by Rau and developed by Roscher and Knies ('money economy'; 'credit economy'; 'capital economy' and

[1] Cunningham Progress of Capitalism, pp. 19ff. British economic historians other than Ashley and Cunningham made little of the distinction between the 'physical' and the 'mental' sides of economic development.

[2] My argument here is essentially that of Erich Fechner's classic article 'Der Begriff des Kapitalistischen Geistes bei Werner Sombart und Max Weber und die soziologischen Grundkatagorien Gemeinschaft und Gesellschaft' Weltwirtschaftliches Archiv, Bd.30 (1929), 194-211.

[3] Arthur Speithoff 'Gustav von Schmoller' Schmoller's Jahrbuch, 42 (1918), 14ff.

so forth) had all depended for their usefulness upon agreement to the tacit - classical economic - assumption that the motivation for the transformation of the economy from one form to another operated at both the individual and the collective level and that 'collective rationality' could be interpreted up to a point using conventional Millian economic theory.

Where pre-Methodenstreit historical economics proved particularly successful was in offering a framework for the critical analysis of economic statements about the past and, by implication, about so-called 'general economic laws'. Historical economists asked whether rent-seeking, cost-minimising, profit-maximising rational conduct was always and everywhere evident from the historical record of human activity; where exceptions to the classical rule were discovered, the form of motivation rather than its social manifestation (collective or individual) was examined to assist in the understanding of the historical phenomenon under examination. The increasingly popular Weberian methodology eschewed this critical approach and adopted instead a typology of <u>organisation</u> rather than <u>motivation</u>.

Yet historical economists regarded their method as superior to the alternative, proto-Weberian, approaches for two principal reasons. First, they assumed that a critical approach to economic science based upon the study of 'economic motivation' provided the firmest foundation for economic science itself. Since Ricardo the aim of economic science had been regarded as the discovery of general laws of behaviour in the economic sphere and the study of human motivation in its historical manifestation obviously

represented a means of understanding more profoundly the nature of those laws. For the historical economists of the late nineteenth century, after all, the psychosocial motivation of economic agents directly determined their actions; institutions merely channelled them. No theory of 'legitimation', however constructed, could hope to analyse sympathetically the motivation of communities and individuals. The second reason the historical economists had for their rejection of post-Methodenstreit sociological history was perhaps less clearly philosophical and more obviously methodological. For the historical economists, their interest in economic institutions lay not in the creation or the teleological purpose of organisations, but in the functioning of those forms of human organisation which gave effect to the motivating factors experienced by historical individuals and groups. Because the 'motivationsweise' of historical communities and individuals was historically determined so the outcome of those propensities would affect institutions and groups over time. Historical economics, then, consisted of the study of the changing nature of economic motivation and of the consequences of this changing motivation for institutions and individuals.

For the historical school the much discussed 'deductive method' was merely the research methodology for a general agenda of study embracing significant change in the non-material affairs of men. Deductive economic science was certainly a central issue of the 'Methodenstreit', but the real character of the debate in Britain in the last two decades of the nineteenth century between supporters of Schmoller and Roschers' insistence upon the use of deductive method in economic enquiry and the Marshallian

neoclassicals hardly amounted to a serious dispute about method - a fact well illustrated by Marshall's own attitude toward contemporary historical economics. Marshall readily acknowledged the need for both inductive and deductive method in economic science [1] and as clearly as any of the most enthusiatic economic historians recognized the need for a well established stock of historical research evidence from which to build workable theory. Indeed, Marshall encouraged the use of what he called 'word pictures'[2] in the economic and social analysis of others, and whilst he regarded historical 'fact-gathering' as, if not a lowly occupation, at least one for pedestrian historians whose lack of analytical imagination and skill would prevent them from making full use of the record of the economic past, he was keenly aware of the limited capacities of economists. He admitted to Lord Acton that

> I read history to distil from it leading ideas suitable for my main problems; I then reread to select the facts wh[ich] bear specially on those ideas; and then suppress any fact

[1] Marshall's frequent statements welcoming deductive method include the following: Alfred Marshall Principles of Economics (6th edn., London, 1910), 29-31; idem. Letter to E.C.K.Gonner, 9 May 1894 in Pigou Memoirs, 380-383; idem. 'The Present State of Political Economy' Times 2 June 1885.

[2] 'Alcoholism and Efficiency', letter to the Times 19 August 1910. The 'word-pictures' approach advocated by Marshall reflects the interest of his own earliest writing in the approach to economic problems developed by Le Play. See Alfred Marshall 'The Future of the Working Classes' The Eagle [St.John's College Magazine], 9 (1875), 1-23 reprinted in J.K. Whitaker (ed.) The Early Economic Writings of Alfred Marshall (New York,1975) volume 1.

wh[ich] is not essential for my special purpose [1].

Neoclassical economic science in Britain was not entirely unsympathetic to economic historical research but was certainly opposed to the use of deductive scientific method alone in aid of the economic analysis of institutional change. Marshall's sceptical attitude to economic historians' presumption provoked and fuelled well known and long lasting antagonism between historians and economists [2], yet the real division between the two remained not one of philosophy or method but of practice and scholarship. Indeed Marshall himself planned to 'make use' of the researches of a number of 'historian economists' such as Charles Fay, John Clapham and the older H.S.Foxwell; each in turn rejected what Fay referred to disparagingly as German 'formulae' [3].

Inasmuch as Marshall's influence upon the fate of British economic history

[1] Marshall to Lord Acton, 13 November 1987 Cambridge University Library Add. MSS. 6443(e) 205. Cf.'Alfred Marshall' in John Maynard Keynes Essays in Biography (2nd edn., London, 1950), 189 n.1. These diametrically opposed attitudes to historical evidence appear to have survived in Cambridge well into the twentieth century : Fay indicated to Charles Wilson that the reason for his (Fay's) failure to remain friendly with John Maynard Keynes was that Keynes '...didn't believe in history. He only wanted to use bits of it for his own purposes.' Charles Wilson 'Keynes and Economic History' in Milo Keynes (ed) Essays on John Maynard Keynes (Cambridge, 1975), 230. In general, there appears to have been little love lost between the King's economists and the economic historians, headed by Clapham, during the interwar years, which appears to have resulted from the fond suspicion of the economists that economic history lacked rigour.(John Kenneth Galbraith A Life in Our Times: Memoirs (London, 1983), 88-89).

[2] John Maloney Marshall, Orthodoxy and the Professionalization of Economics (Cambridge, 1985); Rees 'Recent trends'; Koot English historical economics, 142-150.

[3] C.R.Fay Cooperation at Home and Abroad : A Description and Analysis (London,1908), 20. See also, Kroot English historical economics, Chp. 6 on Foxwell, unhappily the only (very imperfect) study of Foxwell.

was positive, it was through appointments and promotions rather than methodological writings that a distinctively neoclassical approach to economic history developed which eschewed historical economic method [1]. His encouragement of likeminded scholars did much to drive historical economics from these shores. Some part of his influence must, however, be attributed to the fact that, as a good liberal, he did not shrink from holding to a Whig philosophy of history, a tradition particular not only to Cambridge and London economics but more general to social scientific historiography [2]. For Marshall this attachment to whig history implied a view of economic history as rational, orderly and progressive. Competitive forces, when held in check by parliamentary institutions representing the 'will' of a sovereign people, would ensure that organisation and welfare moved hand in hand. Institutional arrangements reflected the efficiency of the underlying economic system of markets and trading conditions. Consequently, Marshall's view of institutions in the economic process differed profoundly from that of British historical economists like Cunningham. For Marshall institutional arrangements did not result from prime motivations but from remote, economic, competitive, ones. So, too, for his historian-economist pupils and followers institutional change resulted from the workings of a competitive or a constrained economic

[1] Marshall encouraged Acton to employ Clapham in writing an economic history of the eighteenth and nineteenth centuries as early as 1897 and sought a teaching appointment from Ellen McArthur for Charles Fay in 1906. Marshall to Acton, 19 November 1897, CUL Add. MSS.6443(e) 206; Eileen Power to C.R.Fay, 17 January 1906, Fay MSS., CUL Add. MSS.7746.

[2] Alexander Gray and A.E.Thompson The Development of Economic Doctrine: An Introductory Survey (2nd edn., London, 1980), 349-350. Some of what follows is based on this perceptive passage. Keynes (Essays, 186) merely describes Marshall's attachment to competition as 'old fashioned'.

system: in monopsonistic industries, wage labour institutions (like trades unions and workers associations) would be impossible to sustain, whilst in free competition all forms of combination, including labour combination, would prove anti-competitive and therefore welfare-reducing. Welfare-enhancing institutions (like educational organisations and charities) might only exist where there appeared to be a general benefit to the whole of society from a reduction in social 'external' costs. Much of this analysis is, of course, well known - but in its historical mode it is perhaps less familiar. Marshall's concern was clearly with what he described as the 'strategy' and not the 'tactics' of past economic organisation [1], with the general structure of economy rather than with the actual behaviour of economic agents, their aims and functions, at any particular time. Thus for Marshall contemporary institutions either acted to hinder the 'historical' theme of competition or actively encouraged it.

British and American economic historians have as a result of the success of post-Marshallian competitive theory assumed the neoclassical tale to be a valid one. To borrow Marshall's own famous analogy, a naval commander needs to know something of the general strategy of sea warfare rather than to have a precise account of some particular battle of the past, a strategy whose general theme is competition rather than organisation. Yet little direct assault upon the historical school's approach to historical economic problems appears to have been made ; instead historical economics of the variety commonly practised in Britain at the turn of the present century has been forgotten and a new model historical economics based upon

[1] Marshall Principles, App.C, 777.

neoclassical principle has been substituted. In large measure what economic historians today refer to as 'historical economics' is, in fact, the application of neoclassical partial equilibrium theory to economic problems and data from the past [1]. In the following work I hope to show that the two approaches are not entirely irreconcileable and that a more pragmatic historical economic analysis of institutional change is both possible and desirable. The value of an historical economic approach to the evolution of institutions of the type discussed briefly here lies in the fact that it does not rely upon agreement as to the fundamental motivating postulates of neoclassical institutional theory (namely profit maximisation, positive rent-seeking and the equating of costs and benefits at the margin). This essay will assert that, on the contrary, the study of institutional change discloses its own logic and behavioural motivations; by relying upon the evidence of institutional change itself rather than upon the tacitly assumed motivating behavioural constants of neoclassical theory it will be argued that a more truthful and historically meaningful economic history can be written. In this sense the present essay is part of the older tradition of historical economics.

II

The arrangement of this essay requires some further explanation, not least because of the apparently dissociated themes of its major parts. In the

[1] It is in this sense that Donald McCloskey recently and mistakenly used the term 'historical economics'. Econometric History (London, 1987), passim.

first part (approximately 20,000 words) we undertake the first comprehensive review of the property rights and transaction cost paradigm that forms the core of the analytical approach developed. The relevance of the approach to economic history will be demonstrated and some more detailed examination of the limitations of some of the more doubtful versions of the theory than has heretofore appeared in published form will be made. An extensive, but by no means exhaustive, survey of the very wide literature relating to transaction costs in economic theory will more accurately reveal the principal features upon which we shall rely in framing an historical approach to the phenomena of property rights allocations and the institutional devices used to secure them. In the second and subsequent parts (of approximately 60,000 words) the analytical framework developed in the course of the first section is applied to the analysis of the institutions and economic behaviour of agrarian southern England during the late eighteenth and early nineteenth centuries. Here novel sources are used to establish the pattern of institutional adaptation in accordance with the theoretical perspective outlined earlier. The admittedly experimental nature of this work (at the time of submission it was the only detailed archival and empirical monographic treatment of transaction cost problems in Britain in historical perspective) provides part of the reason why, in opposition to current orthodoxy in economic historiography, these major elements of the analysis are non-quantitative. As will be illustrated below the measurement of transaction costs is both difficult to achieve and of dubious value to the historical economist, whose interest is in the sources of institutional change and its chronological pattern rather than its statistical significance. It will be

asserted that the property rights and transaction cost approach developed here explains more than merely the particular circumstances of institutional change in the rural world of late Hanoverian England and that, as explanatory device, it stands at the centre of a revived historical economics whose theme is institutional development.

It will also become apparent that this method of historical economic analysis demands an interdisciplinary approach to historical evidence. Consequently much use will be made of legal evidence from the common law courts and legislation of Parliament; at the same time the rich archives of the record offices of southern England provide complementary material for the study of similar themes while contemporary publications and official statistics are also mobilised. This ecological approach to sources reflects the fact that the analysis of any aspect of institutional history must be interdisciplinary by its very nature. Like the historical economists of the last century, this essay suggests that the study of organisational problems should be taken to represent the most difficult and yet most essential part of economic science, for through institutions of many kinds human agents attempt to organise themselves, their effort and their welfare more efficiently. Since the economic logic of that improvement in efficiency that results from the successful exploitation of institutional solutions to economic problems of allocation expresses itself in a number of ways (through both legal and practical means) the historical economist must cast a wide net for evidence in hopes of retrieving the most important material for his study. Equally, as with all such 'experimental' work in historical economics, one must be prepared to discover new and valuable sources for

the period under study which have not previously been exploited with rigour. Here, much of the argument is carried by a close reading of the contemporary legal innovations, revealed in the case law of the period, which supported the organisational change which is the lietmotif of the essay and much of the argument concerning changing form of market organisation relies upon the use of the substantial local, borough and county archives of the Georgian age - still largely unexplored as a single corpus since the days of the Webbs.

With these comments in mind, we begin the preparatory study of the historical economics of organisational change by introducing in some detail the theoretical framework to be used in our historical analysis of the late eighteenth and early nineteenth century.

CHAPTER ONE: THE NATURE AND FUNCTION OF PROPERTY RIGHTS THEORY * [1]

> '...the economic historian who seeks to explain economic growth is thus called upon to explain, among other things, the evolution of the particular set of economic institutions, behavioural constraints, legal rights, and rules that define at any point in history what is commonly called the 'economic system'.' [Richard Sutch, 1982]

The new literature of the property rights and transaction costs (PRTC) paradigm is now very extensively utilised in economics and is very slowly and cautiously being adopted by European economists. Although a relatively recent innovation in economic theory, it has already had a quite noticeable

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* The mathematical and geometrical presentations of various approaches to the theory of transaction cost in this chapter should be accessible to the non-specialist reader with some acquaintance with Paretian welfare theory. The relative detail of the notes to this and successive chapters is intended to offer those not familiar with the extensive literature of the contemporary economic theory of organisation some insight into the diversity of approaches now common in the subject.

[1] I have offered more detailed analyses of the orientation and historiographical significance of the PRTC approach elsewhere: see in particular 'Transaction costs and the history of the law of contract in England, 1750-1850' Department of Economics, Heriot-Watt University, Working Paper 86/7-03 (1987); 'Theory and History in the Economic History of Britain' Scottish Journal of Political Economy, 35 (1988), 92-97; 'Transaction costs, the Coase theorem and the study of economic history', circulated TS, Faculty of Jurisprudence, European University Institute, Florence, June 1987 and discussion paper, Department of Economics, Heriot-Watt University.

impact upon the writing of economic history in Europe [1]. However, the use of PRTC methodology is still principally restricted to North American economists and economic historians. Some efforts have been made in Britain and in the rest of Europe to make more conscious use of the tradition of neoclassical institutional economics principally associated with the new American industrial microeconomics of the later 1970s and early 1980's [2], but the PRTC approach has not enjoyed such an extensive use in Europe that

[1] For an excellent review of the European perspective, see Hans G. Nutzinger 'The Economics of Property Rights - A New Paradigm in Social Science ?' in W.Stegmuller, W.Balzer and W.Spohn (eds.) Philosophy of Economics : Proceedings, Munich, July 1981 (Berlin, 1982), 160-90 and, in general, Jurgen Backhaus and Hans G.Nutzinger Eigentumsrechte und Partizipation (Frankfurt, 1981). This European approach seeks to reconcile the Coasian version of transaction cost/property rights theory with existing (sociological) theories of public economy derived from the work of Berger and Luckmann and others in the 1970s and, more recently, Ulman-Marglit. This European perspective owes something to their earlier 'sociology of norms', on which Karl Deiter Opp 'The Emergence and Effects of Social Norms. A Confrontation of Some Hypotheses of Sociology and Economics' Kyklos, 32 (1979), 775-801 and idem., 'The Economic Theory of Social Norms ('Property Rights') and the Role of Social Structures and Institutions' Archiv fur Rechts- und Sozialphilosophie, 67 (1981), 344-359 are the most instructive contributions. The use of new theories of the firm from within the PRTC nexus of analysis which remain unaffected by this European reappraisal is examined in Alfred D.Chandler and Herman Daems 'Administrative Coordination, Allocation and Monitoring: Concepts and Comparisons' in Norbert Horn and Jurgen Kocka (eds.) Recht und Entwicklung der Grosunternehmen im 19. und fruhen 20. Jahrhundert: Wirtschafts-, sozial- und rechtshistorische Untersuchungen zur Industrialisierung in Deutschland, Frankreich, England und den USA (Gottingen, 1979), 28-52, and in Herman Daems 'The Economics of Hierarchical Organisation' in Papers of 8th International Economic History Congress: B1 Economic Theory and History (Budapest, 1982), 74-87.

[2] See James Foreman-Peck 'Neoclassical Institutional Economics and Long-Term Change in the West' Department of Economics, University of Newcastle, Discussion Paper 86-05 (1986) on these developments.

its success might be considered comparable with that experienced in the United States [1]. Indeed the use of PRTC theory in the context of historical explanation has been condemned by some British economic historians as but 'a highly imaginative piece of intellectual fun' [2] and as an unnecessary addition to the population of economic 'factors' determining economic performance in the past [3].

If the PRTC approach is a 'concept too many' it cannot be because economic historians are presently overburdened with conceptual apparatus. As we have seen, the primacy of neoclassical methodology in economic history in the twentieth century was less the product of social scientific imperialism on the part of economists than the need keenly felt among economic historians for some organising framework for thinking about the economic

[1] The American literature is ably reviewed in Gary D.Libecap 'Property Rights in Economic History: Implications for Research' Explorations in Economic History, 23 (1986), 227-252; Richard Sutch 'Douglass North and the New Economic History' in Roger Ransom,Richard Sutch and Gary M.Walton (eds.) Explorations in the New Economic History (New York and London, 1982), 13-38; Douglass C.North 'Structure and Performance: The Task of Economic History' Journal of Economic Literature, 16 (1978), 963-78.

[2] D.C.Coleman History and the Economic Past : An Account of the Rise and Decline of Economic History in Britain (Oxford, 1987), 133. In similar vein, idem. 'The Uses and Abuses of Business History' Business History, 29 (1987), 141-156, esp.152: 'The 'transaction-cost' approach, currently the darling of some theorists in an effort to explain investment patterns [?], has proved in practice difficult to use because not readily quantifiable. Indeed it may even begin to look a little like one of those 'empty boxes' of economic abstractions which Clapham attacked in a celebrated article over 60 years ago.' In common with many popular accounts of the PRTC paradigm in Britain and the United States, these are not to be trusted for an accurate account of the purpose and function of PRTC in historical study or as an extension of economic theory.

[3] Sidney Pollard 'Transaction Costs,Institutions and Economic Growth : A Comment' Zeitschrift fur die gesamte Staatswissenschaft, 140 (1984), 18-19.

past. In the twilight years of the discipline, between the Methodenstreit and the rise of quantitative and econometric historiography in the late 1950s, there emerged a consensus in favour of economic neoclassicism perhaps too unenthusiastically embraced to be called a method or school. Indeed, in spite of tacit support for the use of neoclassical economic theorizing as a conceptual (idea-organising) activity in economic history most economic historians in these twilight years would have agreed with Professor Rees that '...there is, I am afraid, no agreement about scientific principles which would enable the economic historian to tabulate his facts and reveal their relation to one another and to the whole' [1]. Neoclassical economics was adopted as the theoretical tool of analytical economic history not necessarily because of its superior form or rigour of argument (economic historians in fact use little of the very considerable apparatus of neoclassical theory) but most probably because it provided richly productive categories for historical analysis.

In recent decades, however, the role of neoclassical economics in economic history has come under more scrutiny and has been found wanting. Earlier advocates of the extension of the use of neoclassical production theory in economic history have recognized serious limitations in using it as a means of actually measuring or even explaining complex economic change in past

[1] J.F.Rees 'Recent Trends in Economic History' History, 34 (1949), 13.

time [1]. This is the product of a wider intellectual current as many economists themselves are currently reexamining the neoclassical paradigm and finding weaknesses of ineluctable difficulty. As with most sciences, the potential costs of wholly overthrowing the neoclassical model probably outweigh the benefits and instead economists have set about the task of, incrementally, setting their house in order. One product of this process has been the increasing perception of the important role played by institutions in economic life and the development of a variety of methods by which institutions and institutional change might be integrated into economic analysis [2]. Of particular interest has been the revival of interest in the concept of costly agency and the costs of running an exchange economy - the so-called 'transaction costs' incurred by economic organisations.

The concept of 'transaction costs' and their association with discrete 'property rights' is not a recent device in economics and claims have been

[1] Notably, Peter Temin 'The Future of the New Economic History' Journal of Interdisciplinary History, 12 (1981), 179-197; Peter D. McClelland 'Cliometrics versus Institutional History' Research in Economic History ed. Paul Uselding, 3 (1978), 369-378.

[2] Earlier attempts had been made during the 1950s to late 1970s, including Lindblom's 'mutual adjustment' model; generalised X-efficiency theory; the development of bargaining theories in which blocking coalitions played a more important role and game theory applications to institutional problems. However, none of these attempts from within and without neoclassicism sought to explain the evolution of institutions as historical economic phenomena.

made that Adam Smith [1] and Richard Jones [2] mobilized 'costliness of organisational framework' as a part of their respective dynamic theories of economic development. However, their work was not an attempt to develop a complete theory of transaction cost incidence and behaviour. Neither Smith nor Jones sought to make the minimisation of transaction costs an objective of trading agents. They saw them merely as impediments to the attainment of market, or 'partial', equilibrium; as infrequently occuring but troublesome barriers to the operation of the invisible hand of the market.

In fact, as Ronald Coase pointed out in his seminal paper of 1937 [3], the institutions of capitalism, notably firms, entrepreneurs and shareholders, regularly bear these costs of trading or marketing [4].

[1] A.M.Ulph and D.T.Ulph 'Transaction Costs in General Equilibrium Theory - A Survey' Economica, 43 (1975), 335. See particularly Wealth of Nations, Bk.4 Chp.9. Buchanan has argued that Smith developed a theory of public goods externality in the Wealth of Nations (James M. Buchanan 'Public Goods and Natural Liberty' in Thomas Wilson and Andrew S.Skinner The Market and the State: Essays in Honour of Adam Smith (Oxford, 1976), 279-81) but there is little evidence that Smith offered any comprehensive treatment of the subject. [See, however, Smith's (nearly formulated) account of external effects in 'Report of 1762-3' in Adam Smith Lectures on Jurisprudence ed. R.L.Meek, D.D.Raphael and P.G.Stein (Oxford, 1978), 362ff]. It is undeniable that classical economists had a concept of the costs of exchange but it generally figured only in relation to the discussion of the public economy of government. The most thorough account is John Stuart Mill Principles of Political Economy (London,1848) Book 5 Chp.8.

[2] Gerald David Jaynes 'Economic Theory and Land Tenure' in Hans P. Binswanger and Mark R. Rosenweig (eds.) Contractual Arrangements, Employment and Wages in Rural Labor Markets in Asia (New Haven and London, 1984), 43-45.

[3] R.H.Coase 'The Nature of the Firm' Economica, 4 (1937), 386-405.

[4] ibid., 393-396.

Coase's contribution was to indicate the existence of 'transaction costs', defined as the 'cost[s] of using the price mechanism' [1] - by which he meant the costs of conducting business (such as the costs of drawing up contracts, policing them, enforcing them and so forth). Coase also suggested that impediments to market equilibrium (such as distortions of information and plain cheating) should be taken seriously. The costs involved in attaining equilbrium by removing all these impediments (the 'transaction costs') must be paid to clear stocks and maximise welfare. In a later account Coase maintained that exchange was only costless in the absence of signs of 'market failure' (that is, the so-called 'external effects' of consuming or producing behaviour by one economic agent upon another which are not reflected in market prices) [2]. For Coase the primary motivation of all property-defining activity is the minimisation of transaction costs and the technique used to achieve it is the 'internalisation' of (the recognition of and payment for) all 'external effects' of production which give rise to market failures. In the absence of all transaction costs a Pareto-optimal (ideal) allocation of resources would be achieved by the actions of competing economic agents. In the prescriptive version this so-called 'Coase theorem' predicts that only the eradication of anti-competitive impediments, reducing transaction costs, allows the achievement of both cleared stocks and optimal allocations of goods and services. This definition of transaction costs has come to dominate both the critique of neoclassical economics and new institutional economics (NIE) in spite of its several

[1] ibid., 394.

[2] R.H.Coase 'The Problem of Social Cost' Journal of Law and Economics, 3 (1960), 1-44. Here we need only note that Coase was one of the first to stress the importance of the costliness of exchange. The meaning of the 'Coase theorem' is discussed fully below (p.77).

limitations and contradictions - limitations and contradictions discussed in detail below in this essay [1].

Yet precisely because of these contradictions, 'transaction costs' have come to mean a variety of different things to different economists and economic historians. As one leading practitioner of PRTC institutional economics admits, '...there are too many degrees of freedom' in the definition of transaction costs usually adopted by economists [2]. Defining which real costs of market operation are to be included under the heading of transaction costs has proved particularly difficult for applied economists and it is a problem that has been carried over into the use of the concept in economic history. An example will illustrate the problem. When in 1973 Douglass North sought to enumerate the constituents of historically relevant transaction costs he chose to define them to include search costs, negotiation costs and enforcement costs; by 1981 he had dropped negotiation costs from the outline definition but had added information and measurement costs; a year later, he further simplified this list to include only information, search and measurement costs; but in 1984 his new definition encompassed measurement, enforcement and 'valuation' costs [3]. The degree of confusion evidenced by even a cursory examination

[1] See below, pp.77 ff. and throughout Chp. 3 below.

[2] Oliver E. Williamson 'Transaction Cost Economics: The Governance of Contractual Relations' Journal of Law and Economics. 22 (1979), 233.

[3] Douglass C.North and Robert Paul Thomas The Rise of the Western World: A New Economic History (Cambridge, 1973), 93; Douglass C. North Structure and Change in Economic History (New York, 1981), 36; idem. 'The Theoretical Tools of the Economic Historian' in Charles P.Kindleberger and Guido di Tella (eds) Economics in the Long View: Essays in Honour of W.W. Rostow vol.1 (London, 1982), 16-20; idem. 'Transactions Costs, Institutions and Economic History' Zeitschrift fur die gesamte Staatswissenschaft. 140 (1984), 9-10.

of the historiography suggests that the PRTC paradigm is more perplexing than it is enlightening to most economic historians ('valuation costs', for example, must only include objective costs of valuation, and not subjective costs of evaluation by economic agents but how might one distinguish between the two ?). In order to avoid such ambiguities and to avoid the trap of the capacious definition of transaction costs chosen by economic historians, a thorough and analytically rigorous understanding of the function of transaction costs is required. In the rest of this and in succeeding chapters, therefore, an attempt will be made to find a methodologically satisfying definition of transaction costs for use in historical study which adequately captures the historical reality of changes in the volume and significance of transaction costs.

Given these difficulties of definition, it may be asked why economic historians should seek to use such a unfortunate category of economic explanation in aid of historical analysis. One answer is that the comparative study of property rights structures enables the economic historian to analyse economic organisation itself more acutely and enables him to consider the complexity of organisation and the performance of institutions within the economy simultaneously as no other comparable analytical framework permits [1]. Perhaps more significantly it permits economic history to be used as a means of constructing workable theory,

[1] On the 'proper' function of PRTC within economic history, see North Structure and Change chps.4-6; idem.'Beyond the New Economic History' Journal of Economic History, 34 (1974), 1-7; idem. 'Structure and Performance: The Task of Economic History' Journal of Economic Literature. 16 (1978), 963-78.

'...theory which is consistent in regard to its internal relationships, behavioural postulates and fundamental postulates of economic theory' [1], theory which is derived from empirical observation of historically evidenced change in the structure of the economy. The most outstanding difference between traditional, neoclassical, economic history and the historiography of the PRTC paradigm is the relative impossibility of proof and demonstration to a satisfactory degree in the former [2].

Given this wide ranging agenda of historical study it is strange that the Coasian perspective within the PRTC literature still exerts so strong an influence over economic historians. For Coase, as we shall see, the economizing function of organisations explains their evolution once and for all - like all varieties of neoclassical economic theory it presumes that structural changes in the form of the economy matter less than the marginal welfare gain or loss enjoyed or endured from the attempt to internalise externalities, reduce diseconomies, reduce organisational and hierarchical inefficiency and so forth. Economic historians have no interest in the teleological, redundant and unhistorical discourse of the neoclassical economist. It is natural for economic historians to wish to explain the evolution of 'structure' as well as the subsequent economic 'performance' of

[1] Douglass C. North and Robert Paul Thomas 'Comment' Journal of Economic History. 35 (1975), 19. Even critics of the PRTC approach agree with this general aim for economic history (e.g. W.W. Rostow '[Review of] Structure and Change in Economic History...' Business History Review. 56 (1982), 301).

[2] On which, Mark A. Gray 'Theory and History in the Economic History of Britain' Scottish Journal of Political Economy. 35 (1988), 92-96.

organisation; yet it is also the purpose of economic history to account for patterns of development in economies of varying historical experiences.

It is this latter form of historical economic discourse that has proved to be the most difficult within the PRTC tradition for economic historians [1]. It necessarily involves the study of aggregated transaction costs – also referred to as the 'transaction sector' (TS). Theoretically, the growth of the TS accompanies economic growth, for in simple exchange economies few elements of TC are routinely incurred (those that are are relatively insignificant), whilst in more complex economies like our own the TS will account for a substantial portion of national income. Yet the growth of the TS to a present predominance in the aggregate economic activity of western capitalist economies is a relatively recent phenomenon. Aggregate measures of the growth of the TS are few, and indices already constructed by economic historians (including measurements of the growth of the service sector) are not identical. By using data from occupational censuses (counting the number of employees employed in a variety of industries or sectors) two economists have constructed indices of the size of an amorphous 'exchange sector' (Table 1.1 below). Counting those employees whose employment is directed toward exchange but whose labour does not directly enter into the production of goods and services themselves, provides a very rough and selective guide to the history of the TS over the past century and a quarter. When such exercises have been carried out, they

[1] Douglass North 'Institutions, transaction costs and economic growth' Economic Inquiry. 25 (1987), 419-428.

show [1] that the experience of high aggregate levels of the TS stretches back to the 1920s and a little beyond in Britain and the USA. However, for most of human history the aggregate transaction sector must have been at a relatively low level and, consequently, occupational indicators of the size of the TS are problematic for earlier periods [2]. Nevertheless, the rough approximation allowed by the occupational census materials allows some conclusions to be drawn: in the main the rise of the TS as a category of economic activity is an overwhelmingly twentieth century phenomenon; nevertheless, the growth of Adams's 'regulatory sector' must have parallelled a slow but perceptible rise in the TS throughout the nineteenth century, a rise in aggregate costs of transacting most marked in the 1840s, 1860s and from 1910 onwards.

[1] Estimates in Table 1.1 were an attempt to reconcile Adams' 'regulatory sector' with the North TS; consequently figures here given are not identical with those in Douglass North and John Wallis 'Measuring the Transaction Sector in the American Economy, 1870-1970' in Stanley L.Engerman and Robert E.Gallman (ed) Long Term Factors in American Economic Growth (Chicago, 1986), 95-161. It must be noted that, whilst the method of calculation is the same as that used by Clark and Fourastie in their classic studies of the services in national income, their 'tertiary' sector is nominally smaller than that of North's transactions sector, for the latter includes much labour for the regulation of production which enters into total cost.(Colin Clark The Conditions of Economic Progress (2nd edn., London, 1957), 397 ff.; Jean Fourastie Le Grande Espoir du XXeme siecle (Paris, 1949).

[2] Long period histories of property rights are few, but see North and Thomas Rise of the Western World: Douglass C.North 'Governments, Voluntary Organisations and Economic Life: The Preindustrial Development of Western Europe' in Svetozar Pejovich (ed.) The Codetermination Movement in the West: Labour Participation in the Management of Business Firms (Lexington, Mass., 1978), 115-129; E.L.Jones 'Institutional Determinism and the Rise of the Western World' Economic Inquiry. 12 (1974), 114-124; Alexander J. Field 'The Problem with Neoclassical Institutional Economics: A Critique with Special Reference to the North/Thomas Model of pre-1500 Europe' Explorations in Economic History. 18 (1981), 174-98.

Yet the use of occupational data to define the chimerical transactions sector is clearly flawed. Occupations do not entirely account for all of the transaction cost minimising behaviour of agents in the economy. Personnel merely operate institutions which are themselves cost minimising mechanisms for the transactions undertaken within the economy. Thus, while the employment of conveyencers constitutes an attempt to facilitate institutional transfers of property and land, their employment as individuals is the least important feature of the institution of legal conveyance. What makes the legal conveying of property by independent conveyencers possible is the existence of regulatory standards for their behaviour and laws or codes for documents used in their work - and it is the cost of establishing, policing and enforcing these standards and codes which are properly called the transaction costs of conveyancing.

In reality the economic analysis of transaction costs pays little attention to the labour cost of producing marketable products; instead economists define transaction costs in a way quite alien to the economic historiography of transaction sector costs [1]. Before we can usefully adapt the economic analysis of property rights and transaction costs to the study of late eighteenth and early nineteenth century market conditions, therefore, it is essential to determine precisely what the economic theory developed by economists writing about PRTC issues means. Many different and conflicting opinions remain to be resolved concerning transaction costs and their incidence among economists themselves. In part this chapter and the following two are an attempt to make a synthesis of this broad and complex

[1] Compare North and Wallis, 'Measuring the transaction sector' with North, Structure and Change.

Table 1.1 : Estimates of the size of the 'regulatory' and 'transactions' sectors of the U.S.A. and Great Britain 1841-1951 (numbers employed in sector and % of national population employed therein).

	[1] Great Britain		[2] United States	
	No.('000)	%	No.('000)	%
1841	599	3.1	n.a	
1851	851	4.1	n.a	
1861	935	4.0	n.a	
1871	1473	5.7	n.a	
1881	1768	5.9	n.a	
1891	1974	6.0		
1900			4435	5.5
1901	2275	6.2		
1910			7465	8.2
1911	3070	7.5		
1920			9953	9.4
1921	3738	8.7		
1930			13734	11.2
1931	4485	10.0		
1940			15849	12.0
1950			20789	13.8
1951	6581	13.5		

Sources: (1) Richard N. Adams Paradoxical Harvest: Energy and Explanation in British History, 1870-1914 (Cambridge,1982) Table 9.2 p.91.

(2) Calculated from figures given in Douglass C. North 'Transaction Costs in History' Journal of European Economic History 14 (1985) pp.573-575 using B.R. Mitchell International Historical Statistics for the Americas and Australia (London,1983) Table B.1 p.50.

literature but the primary task remains to relate the PRTC paradigm to the work of the economic historian concerned with the essentially historical problem of determining the nature and causes of economic change.

Before we define more closely the types of transaction cost with which an historical economist is likely to be concerned and the theory which supports and explains much of the behaviour of aggregate and agency transaction cost, it is necessary to understand in some detail what economists take transaction costs to be and how they expect them to express themselves in historic economies. It is often useful to adopt the heuristic of studying the historical evolution of analytical devices in economic science, not least because in many cases it becomes clear that the precise usage of a concept or category differs substantially from the latter-day, contemporary usage. In relation to the notion of transaction costs this approach seems particularly well founded for, whilst originating in neoclassical exchange and value theory it has come to be regarded by most European economists - wrongly - as part of the Walrasian tradition that became subsumed under general equilibrium theory; and in North America it is a peculiar brand of neoclassicism that now claims the idea of transaction costs as part of its own apparatus of theory. A review of the theory further enables us to get a somewhat clearer idea of the meaning of the concept of transaction costs. Transaction costs have come to mean at once everything and nothing to the contemporary economist, definitions of transaction cost being imprecise and eclectic in some cases and over-deterministic in others. Perhaps the most bothersome question facing economists is the seemingly trivial one of deciding whether costs of single

agency transactions are in effect discounted by agents and incorporated into their fixed cost constraint (or as utility function constraints). Franklin Fisher has described the fixity of some transaction technologies (like setting up the physical environment for trade) as imposing 'transaction constraints' which have the same characteristics as economic constraints upon individual agents [1]. This quintessentially Marshallian view of some transaction costs has some considerable support among some economists although the subtlety and importance of the argument should not be overlooked. Since this approach to the single agent's cost of transacting was introduced by Alfred Marshall an examination of his argument and neoclassical method takes us some way toward understanding the difference between transaction costs and transaction constraints, and allows us to enter into the analysis of transaction costs at a sophisticated level.

Neoclassical economics is that variety of economic science most commonly taught, written and read in the West today principally because of its success as a means of describing and predicting the behaviour of firms, households and governments. Like most social scientists, the early neoclassical economists to whom is generally attributed the cornerstone of present day analysis - the analysis of costs and individual demand prepared by Jevons, Marshall and their followers - believed that the material conditions of the world acted to constrain human behaviour and that '...in three cases out of four [economic scientists believed] that in spite of our growing command over nature it is still things that are in the saddle, still the great mass of mankind that is oppressed - oppressed by things.

[1] Franklin M.Fisher Disequilibrium foundations of equilibrium economics (Cambridge, 1983), pp.139ff., 149-151.

The desire to put mankind into the saddle is the mainspring of most economic study' [1]. The efficient allocation of the scarce resources somewhat mitigated the effect of the command exercised by 'things' over men and women. The fact that resources might not satisfy all wants placed resources firmly in the saddle and left men on the ground; but if men could organise resources in such a way as to assign those resources to a number of uses efficiently so as to maximize the happiness of society and minimize its misery and the rider might be unseated temporarily.

For neoclassical economists, unlike the majority of their forbears, the existence of the market secures the means by which resources and present needs might be brought into balence. Through markets, men may compete for those alternative uses they have for the limited resources available by offering to buy, or ceasing to demand at present prices, the resources offered for sale. The market acts, in the famous words of Adam Smith, as an 'invisible hand' to achieve an appropriate distribution of resources. The market itself, long the centre of economic analysis, can be viewed as an essential institution in the 'war' against the misuse of the earth's limited fund of endowments. Indeed, as a political critique of the contemporary economy neoclassical economics with its emphasis upon the cost of alternative uses of resources (the so-called 'opportunity costs') views the market system as the guarantor of a freedom only occluded by the moral implications of competition for those scarce resources. Marshall himself pointed out in correspondance with a concerned cleric that 'In ideal freedom there is no competition, except perhaps emulation in doing good for

[1] [Alfred Marshall] Speech to Senate, 14 May 1903 Cambridge University Reporter. 33 [no.37] (1903), 773 column 1.

its own sake. But in that ideal state there is no need for private property, nor policemen nor any of our social burrs' [1]. In short the regulation of competition in the (less than ideal) market system for resources consumes resources itself, for in our less than ideal state we have need of both private property and Marshall's stylised 'policemen' of competition, and rules or social laws to check anarchistic competition. The stability of the institution of the market guarantees the viability of allocative choices and, in Marshall's phrase, places 'things' on the ground.

The problem of allocation, then, is directly concerned with the choice of technique to achieve the optimal distribution of limited resources. In 'ideal freedom' the market will facilitate the assignment of goods and services to optimal allocations without competition, for competition implies the distinction of ownership, proprietorial interest and competing arguments for the use of resources which are normative in character. These elements of dysfunction in the market process ought to be removed, according to the neoclassical analysis of the market system, to allow markets to function unfettered by conventions, institutions and habits. Indeed, the notion of market perfection plays a very important part in the logic of the neoclassical case precisely because the attainment of perfect markets proceeds from the elimination of the elements of dysfunction.

For Marshall and for contemporary non-Walrasian neoclassicals of his day, the costs of running a market economy were supposed to be considerable but

[1] Marshall to Bishop Westcott, 10 January 1901 reprinted in A.C.Pigou (ed.) Memorials of Alfred Marshall (London, 1925), 394.

had the characteristics of fixed or sunk costs for producers [1]. Producers and consumers acted as if the system of exchange, distribution and pricing occurred independently of decisions to produce or consume at all. In short, the transactions mechanism of the market incurred fixed costs of use similar to those associated with a toll bridge or a ferry: once sunk costs had been assigned, prices for associated goods or services would merely be 'marked up' accordingly. No consumer or producer would ask whether the additional sunk cost mark-up should affect his decision to trade or produce.

For Marshall, then, these 'costs of commerce' were fixed in the same way that a tax upon any commodity might restrict consumption and thereby affect sales. Marshall regarded the process of 'markup' - of an additional charge beyond that attributable to the direct cost of production, the cost of entrepreneurial coordination and the cost of labour involved in manufacture - as universal and invariable. Producers would have to take into account the cost of marketing a product but, once this had been done, all of the true 'accounting costs' of production would have been taken into account in pricing the commodity. These fixed costs of commerce were, therefore, necessary, ineradicable costs which had to be paid in order to maximise profit and, even though Marshall recognized that in different circumstances of transportation, marketing facilities and so forth the 'cost of commerce' might be unilaterally greater or lesser than in other circumstances, he does not seem to have regarded this comparative difference as in any way remarkable [2].

[1] Alfred Marshall Principles of Economics (6th edn., London, 1910), Bk.5 Chp.7, especially paras. 2 and 3. Contrast Mill cited above.

[2] ibid. Bk.5, Chp.7, para.3, pp.397-398.

In Marshall's analysis, then, lump sum trading costs would reduce net revenue just like a unit tax on output - by reducing the amount of simple profit as a residual from revenue after all costs had been paid. In fact these costs which Marshall attributed to the process of trading or marketing are, in reality no more than sunk costs or 'prime costs' attributed to the operation of marketing; they do not arise because of the form of marketing appropriate to the current market but because marketing is undertaken at all. Marshall's sunk costs of marketing in fact enter into the fixed costs of production just as insurance costs enter into the fixed costs of production where risk is high. Marshall himself developed a close analogy between these marketing costs and the cost of insurance, recognizing that the latter represented an objective cost for the reduction of uncertainty [1]. He nevertheless carefully distinguished between marketing-related costs where the purpose of paying them was to secure nothing more than peace of mind (like insuring goods for shipment) and the costs of bringing goods to market and did not suppose that his 'costs of commerce' were in any way affected by uncertainty.

In quite another sense, of course, these fixed costs of commerce are like insurance premium costs inasmuch as they ensure that prices can be offered and accepted at the market. The 'costs of commerce' (nowhere precisely defined or itemised by Marshall) presumably include the costs of delivery, specifying the content of the order and, for goods sold for later delivery (in futures and commodities markets, for example), the cost of underwriting failure to deliver the required order. In this rather imprecise sense, straining the meaning of the few passages in which he analysed the fixed costs of commerce, Marshall's

[1] Ibid.

interpretation suggests that one might regard these costs as a form of insurance against the collapse of the market - of a particular form of market failure in fact.

This distinctive approach to the economics of the market - ascribing zero costs of regulation to an economy in 'ideal freedom' and attaching all marketing and trading costs in competitive economies to the fixed costs of production - suggests that Marshall believed the costs of market activity to be tangible and continuous with production. Only in one memorable and striking passage in the Principles did Marshall hypothesise what consequences might attach to an imaginary economy without property rights - in this case an altruistic, moral economy:

> It is quite possible that there may be worlds in which no one ever heard of private property in material things, or wealth as it is generally understood; but public honours are meted out by graduated tables as rewards for every action that is done for others' good. If these honours can be transferred from one to another without the intervention of any external authority they may serve to measure the strength of motives just as conveniently and exactly as money does with us. In such a world there may be a treatise on economic theory very similar to the present, even though there may be little mention of material things, and no mention at all of money [1].

Whilst Marshall's primary intention in these remarks was to illustrate the necessity of materialist method in the creation of a theory of value, it is clear that the existence of property transfer under such a regime would imply the existence of transaction costs only in the form of the 'graduated tables' themselves, for whilst no external authority might allocate rewards or honours Marshall recognized that someone would have to draw up appropriate tables. This taxonomy of the costs of running a competitive

[1] ibid., Appendix D, para.2, 782-783.

economic system, which includes at one extreme the 'ideal' economy with no transaction costs and at the other fully assigned, but fixed, costs for marketing, carries all of the fundamental characteristics normally attributed by contemporary economists to transaction costs: Marshall was, however, notionally though not at all expressly committed to the view that as such transaction costs were always indivisible and strictly non-convex.

The Marshallian consensus that the costs of exchange were ordinarily 'sunk costs' survived well into the present century, receiving an early formulation in the work of Pigou and Allen Young on welfare economics [1]. Pigou formulated an elaborate and detailed theory of the economic consequences of production itself, arguing that if in the process of creating saleable output a producer caused harmful effects to be manifested externally to the productive activity, then some levy or 'proportional tax' needed to be raised from the producer to compensate others not directly involved in his production though suffering its consequences. These so-called technological external effects or 'externalities' clearly impair economic efficiency if they mean that payment or tax schemes could make the one unwilling 'externality consumer' better off without making the producer worse off; similarly, if the external effect were a positive benefit to the consumer of external effects then a Pigouvian proportional 'tax' might be levied on the consumer to reward the producer, providing that it did not reduce the value of the non-producer's welfare. These 'market failures' have been regarded by subsequent economists (notably by Coase and subsequent

[1] In A.C. Pigou Wealth and Welfare (London, 1912); Allyn Young '[Review of] Pigou's Wealth and Welfare' Quarterly Journal of Economics, 27 (1913), 672-686.

students of transaction costs) as the most common source of transaction costs; in general, all neoclassical theories of transaction cost since Coase have, along with Pigou, regarded the existence of ineradicable market failure as the firmest evidence for the existence of transaction cost. A word of explanation is necessary to appreciate the link between external effects, market failure and transaction costs. Up to now, we have, in common with most neoclassical formulations of external effects, presumed external costs to arise in the process of production. Transaction costs economists perceive of external effects as the source of transaction costs - so that information assymetries, measurement errors and other sources of instability in the bargaining environment that thus give rise to market failure (literally, the failure of the market mechanism to cope with distortions of bargaining ability) are counted as part of the ex ante transaction cost component of exchange.

This brief and somewhat impressionistic sketch of the theory of Pareto-relevance in external effect assignment suggests that 'proportional' payments of a Marshallian variety might actually improve the allocative and output performance of an economy in the presence of elements of market failure. The most extensive, though not entirely satisfactory, part of the debate over the effectiveness of Pigouvian tax imposition has indeed been said to be largely semantic - a question of defining how many of the Marshallian characteristics of proportional payments the optimal Pigouvian tax possesses [1]. In fact, the theory of allocative efficiency associated with the name of Vilfredo Pareto is but part of a more general

[1] Charles K. Rowley and A.T. Peacock Welfare Economics: A liberal restatement (London, 1975), Chp.2 .

theory of economic optimality which relates the assignment of endowments or property rights to outcomes from bargaining intended to maximise individual utility. In Walrasian, Paretian and neoclassical theories of bargaining, the 'proportional' characteristics of Pigouvian taxes are varied but all forms of welfare allocation rules at their most extreme are alike in ascribing to consumers and producers well ordered, twice differentiable, intertemporarily stable, continuous production and utility functions for commodities which are at once entirely divisible and technically achieveable. The requirements for the achievement of economy-wide welfare equilibrium through exchange in each case (for the Paretian theory, the attainment of Hicks-Kaldor compensation equilibrium and Scitovsky negativity; for neo-Walrasian theory, the continuity of Walras' Law and the attainment of Lindahl equilibrium; for a core allocation, the absence of 'blocking coalitions') amount to no more than rules about the use of initial endownments given only information about present allocations. The specific requirements of each need not detain us.

In general, however, the problem with all such Paretian 'clone' theories of allocative welfare equilibrium is one of assuring the continuity of decision-making in accordance with these 'rules of the game': of making sure that consumers and producers of externalities and private goods adopt consistent measures to ensure the attainment of allocative solutions. In general economic theorists can at least agree upon two such basic rules which could conceivably be followed by all producers and consumers. All would have room for a simple decision rule to the effect that, if neither consumer's nor producer's budgets and utility functions were capable of

bearing the additional costs of internalising an externality, then the external effect would continue unabated and utility-en hancing exchange might not occur. Similarly, all such welfare theories would necessarily include a simple minimization rule such that the costs of internalising the externality - principally the costs of arranging for its removal or reduction - were as low as possible to ensure global equilibrium. These two postulates have, in fact, formed the basis for the analysis of transaction costs within the neoclassical framework. (There is of course one further possible outcome: merger between producers and consumers in the face of external effects would absolutely 'internalize' the external costs; 'internalisation theory'is however merely an extension of the general model). To summarise, all such 'clone' theories would broadly agree with the following statements of principle:

Statement 1: Present budgets and needs constrain agents in 'external effect internalising activity' (Some theories of transaction costs make more of this than others).

Statement 2: Minimization of the total costs (opportunity costs) of the externality reducing mechanism or action is a necessary but not a sufficient condition for equilibrium in any economy.

However, where the assignment of property rights over production and consumption activities is unequivocal and irrevocable at the time of the incursion of external costs, the clone theories all suggest that exchange solutions to the problem of internalising market externalities are

preferable. All of the varieties of PRTC theory appearing in the literature of economic science over the past twenty years have these basic characteristics in common. All have extracted from the Marshallian neoclassical formulation of the incidence of proportional payments for transaction technologies, Pigouvian externality theory and the common postulates of Paretian welfare analysis given above the material for their own formulation of PRTC theory; each does however maintain very different characteristic features without which no full understanding of the heterogeneous concept of transaction costs can be fully understood. Indeed the fact that no full and comparative survey of the various approaches to transaction costs has, until now, been presented indicates that PRTC theory is, by nature, varied and complex. One reason for the apparent difficulty experienced by historians in their application of PRTC theory has been their failure to recognise this diversity of meaning and the theoretical foundations of the different approaches developed by economists. In the next two chapters we shall examine, in turn, partial and general equilibrium, 'pure neoclassical', 'new institutional' and neoinstitutionalist theories of transaction costs and their application in order to discover an applicable - and workable - theory which has relevence for historical economic study.

As the analysis of transaction costs and the theory of property rights proceeds, it will be necessary to resort occasionally to some detailed but not very difficult exposition of the underlying economic theory needed to understand the later argument about the usefulness of the transaction cost paradigm. At this point in the exposition of this complex theory it is

prudent to present a more thoroughgoing analysis by means of simple diagrams of the properties of transaction costs and their incidence applicable to all rival theories; consequently the analysis which follows in the next chapter presents an intermediate summary of the neoclassical single market theory of transaction costs incidence. Whilst the presentation necessarily assumes some familiarity with the elementary Paretian theory of welfare, which we have already understood to be at the centre of all 'clone' theories of transaction costs, it assumes no more than this; furthermore, the material contained in this simple outline of the theory of transaction costs in competitive exchange bargaining is entirely derived from standard theory and only differs from textbook analysis in the form of argument, not in conclusions. Throughout, the non-economist is invited to remember that the 'markets' mentioned are model or ideal-type markets, not real ones and that commodities produced are not in joint supply. He is also asked to check his distrust of the apparently simple models presented here and to remember that few economic modelling exercises ever attain a representation of real world situations.

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CHAPTER TWO: THE INTERMEDIATE ANALYSIS OF TRANSACTION COSTS: PARTIAL EQUILIBRIUM AND 'CHIVIRLA' VARIANTS.

'Many people have a passionate hatred of abstraction, chiefly, I think, because of its intellectual difficulty; but as they do not wish to give this reason they invent all sorts of others that sound grand. They say that all reality is concrete, and that in making abstractions we are leaving out the essential. They say that all abstraction is falsification, and that as soon as you have left out any aspect of something actual you have exposed yourself to the risk of fallacy in arguing from its remaining aspects alone. Those who argue in this way are in fact concerned with matters quite other than those that concern science ' [Bertrand Russell, 1931].

Having outlined in general terms the nature and function of elementary theories of transaction costs, it is necessary to embark upon the more detailed analysis of the concept with a view to examining the limitations of the theory and the variety of different approaches which have a claim to be regarded as principal representatives of the modern economics of transaction costs. Throughout this chapter and the following, an analytical approach will be developed which requires some not very extensive prior knowledge of economic theory. Throughout readers are recommended to observe that no formal presentation has been attempted hitherto which integrates the disparate approaches to the economics of transaction costs using pure theory and as such the present chapter represents a tentative evaluation of competing approaches using the methodology of modern economics. Before this evaluation can be undertaken, however, some more concrete model of transaction costs in a simple economy has to be developed to act as a tool for further discussion later. Thus far, indeed, we have said a good deal about the contending theories of transaction cost incidence and the effect of transaction costs upon economic performance without specifying exactly how they affect the behaviour of exchanging consumers and producers. In what follows an elementary analytical treatment of transaction cost incidence in

partial (or market) equilibrium will be outlined, fleshing out the rather insubstantial summary of the foundations of the 'clone' theories we have identified. Then we shall offer a detailed introduction to the more technically demanding theory of transaction costs in general equilibrium economics, as well as pursuing the version of transaction cost theory with which most economists are familiar - namely that variety of neoclassical microeconomic analysis associated with what we shall label the 'Chivirla school'. The order in which contending transaction costs theories appears is not especially important and it should not be supposed, for example, that any theory later in the sequence is regarded as necessarily better than its predecessor.

It is the case, however, that the partial equilibrium (or market) theory of transaction costs is the basis for most of the contending theories and approaches and therefore deserves to be outlined first. Neoclassical partial equilibrium theories of transaction cost are based upon a thoroughgoing theory of exchange - which in turn relies upon a set of predicates about the behaviour of consumers and their preferences. A simple summary of this neoclassical theory of consumer behaviour would refer to the assumption that consumers always maximize their utility (or satisfaction) where possible, taking into account the economic constraints upon their choice-making but assuming that they exercise their freedom in discrimination as a result of full knowledge of the market environment and that they observe some assumed logical constants - for example, consumers are supposed to be able to order their preferences between goods within the total 'bundle' of goods they consume in such a way as to make their preferences logically coherent or 'transitive'. The detailed theory of exchange

need not detain us; it is sufficiently well known to require little further elaboration. Suffice it to say that the principal conclusion of the theory of exchange which is of vital relevance to the theorist of transaction costs is the principle of the 'marginal rate of substitution'. Briefly, economists assume that, in order to remain at a maximal level of satisfaction (to maximize utility by allocating income to a bundle of goods and services which yield maximum satisfaction) consumers may have to reallocate their expenditure between goods. Suppose, for example, that two goods, X and Y, are consumed in various combinations - all of which combinations ensure that consumers attain the maximum level of utility. One might combine 3 units of X and 3 of Y, for example, and gain the same level of total satisfaction as one would from a combination of 4 units of X and 2 of Y. The example figures are fictitious but the principle (usually illustrated in introductory economics texts by use of the 'indifference curve') is generally adopted that the marginal rate of substitution measures the rate at which a consumer will have to forgo units of X in one combination in order to obtain more units of Y whilst still remaining, overall, at a constant maximum level of total satisfaction.

This guiding principle of the marginal rate of substitution is the cornerstone of the neoclassical theory of transaction cost in exchange - for transaction costs are held to affect the degree to which consumers when they are acting as single bilateral exchanging economic agents can attain a more general equilibrium in exchange in which total community satisfaction is maximised. The full general equilibrium theory of transaction costs is of course concerned both

with production and consumption and analyses the effect of transaction costs upon the attainment of economy-wide efficiency. But we can proceed a good deal of the way toward an understanding of transaction costs by following the implications of the principle of the marginal rate of substitution further into the area of exchange. Up to this point we have assumed that our utility maximizing consumer chooses bundles of commodities without stating where such bundles come from. Suppose now that two such consumers face each other over a table, each one endowed with a certain stock of two commonly traded and desirable commodities. In order to maximize their respective levels of total utility they are forced to exchange units of one commodity for another. Thus consumers A and B possess stocks of commodities 1 and 2 which may be arranged according to the general principles outlined above in order to maximize utility. Consumer A, for example, could swap some of his units of commodity 1 in order to maximize his total utility by getting more of commodity 2 from B. Naturally there will be circumstances in which exchange is possible (i.e. both are moving toward 'equilibrium') and some where it becomes more difficult. In general, however, exchanges of commodities between the two will stop where the marginal rate of substitution for each pair of goods 1 and 2 is the same for A and B where they are both consuming both goods. At this point the 'market' for goods 1 and 2 between A and B will clear and a maximum level of total satisfaction (A's satisfaction plus B's satisfaction) will be attained. (Notice that although conclusions have been reached regarding the general equilbrium of exchange the principles upon which this conclusion has been reached are quintessentially partial assumptions and postulates).

The instances where the two consumers find their marginal rates of substitution are equal describe a 'contract locus' or curve within a two dimensional space representing trades between them - and economists conventionally represent this by use of an 'Edgeworth-Bowley box' diagram [1]. Here we need only note that the diagrammatic representation of this exchange equilibrium occurs in most standard introductory and intermediate texts in microeconomics and may prove helpful in visualizing the process by which a contract locus is created. However, we can proceed a good deal of the way toward an accurate definition of transaction costs in exchange without using such a diagram. Imagine consumer-exchangers A and B are again tracing out the contract locus of marginal equivalence for the substitution of goods 1 and 2 - that is to say, by experimental bids and offers they are arranging to exchange sufficient quantities of either good so as to maximize their total utility from both goods. A number of immediate contracts of exchange can be arranged and 'swaps' made.

Some swaps, however, will not be as easy to arrange. Suppose, for example, that the swapping consumer A requires an extra half unit of commodity 1 to bring a bundle of goods, called X, to the contract locus - that is, to make the choice of X consistent with the prevailing marginal rate of substitution. If the swapping consumer B is disinclined to leave himself with a useless half unit of commodity 1 in order to engineer the swap that will otherwise enable the two to attain the contract locus the contract will not occur and the two will not have attained exchange equilibrium across all possible pairs or

[1] See, for example, J. W. S. Cassels Economics for Mathematicians (Cambridge, 1981), 19-22.

combinations of bundles. Thus consumers in the exchange model are usually assumed not to mind dividing up commodities if the gain from creating fractions of commodities places them on the contract locus. They are said to accept the absolute 'divisibility' of their endowed goods 1 and 2. The fact of divisibility is thus a key feature of the exchange model; however, it also has consequences for the analysis of transaction cost. If divisibility is required to attain exchange equilibrium, for example, rules will have to be established governing the dividing up of commodities. Thus, whilst one cannot physically divide a horse one might divide the time that the horse spends in pulling ploughs for A and for B; and whilst it might be practical to halve a bottle of wine it is not easy to divide a car or a radio.

Contractual arrangements, stipulating when and how commodities will be swapped for use will have to be devised and policed; a measure of usage will have to be introduced and someone (probably a third, independent agent) will have to be employed to monitor the whole process of joint use. The costs associated with the policing, monitoring and arranging of such contracts for the joint use of a commodity are transaction costs and arise because of the fact that goods are often indivisible or imperfectly divisible. And because the potential attainment of the contract locus with every conceiveable bundle, x,y,z...n, is a requirement for general equilibrium in exchange, transaction costs must be paid in order to ensure that all possible swaps can occur. After all, if one person gains more from portioning a commodity consuming it along with other portions or wholes of other commodities than another person, then the

principle of exchange equilibrium will have been disregarded. Transaction costs therefore have the effect of separating exchanging parties from the attainment of exchange equilbrium (which includes Pareto equilbrium) where the divisibility problem intrudes.

Readers will have concluded rightly that divisibility is only one aspect of the problem of exchange which gives rise to transaction costs. For in an exchange economy of the type we have been imagining all swaps or trades will require some degree of policing and monitoring - and it is in this way that transaction costs arise. Indeed, because we have assumed that each economic agent, A and B, is seeking to maximize his own utility in relation to exchange we have left aside any thought of requiring either of them to act 'fairly' or decently toward each other - all the more reason, then, for both A and B to seek to impose controls over the exchange process. There may even be circumstances in which trade cannot take place, swaps cannot be made, without the payment of these costs. Transaction costs are thus ubiquitous in the world of bilateral exchange.

However, the careful reader will want to discriminate between the costs of 'setting up' exchanges in general and the costs of making single contracts. We have said that the governance of exchanges made in order to attain exchange equilibrium requires certain transaction costs to be paid - but we have said nothing about the costs of exchange which are continuous with trading. For example, communications must be established between A and B; a language of legal obligation created; and a framework for redress developed. In a world in which agents A and B are to act as self- interested utility

maximizers some ground rules will have to exist before a single trade or swap is made.

These 'set-up' costs differ from transaction costs in two important ways. First, transaction costs are themselves subject to the principle of divisibility whereas set-up costs are not. Take for example a repetitive contract between A and B requiring the exchange of the right to use some asset for a period of time - such as a car. Naturally A and B will want to write out an agreement stipulating that the car is to be used by A for a number of months and by B for the remainder. They will want to include clauses and subclauses covering such minutiae as the time required for servicing the car, the responsibility for accident repairs and so forth. These are not mere incidental details but rather essential to the nature of the problem of fully specifying the exchange in such a way as to allow both A and B to attain maximum satisfaction. The writing of the contract - the drafting, specification and enforcement of the rules governing the trade - will necessarily incur transaction costs in the making of the agreement and in its policing and monitoring. Yet the costs of establishing a legal code of the type that allows contractual devices to stand indefeasible and unchallenged by unilateral abrogation - the sort of general principles of law, for instance, that almost universally dictate the form of exchange in widely different societies - are largely indivisible. It is not possible, for instance, to invoke principles of fairness on one occasion and not on another without a degree of power imbalence or information distortion. Set-up type costs, then, are those which, whilst proving essential to the process of attaining exchange equilibrium, are neither divisible nor

subject to dispute. Set-up costs are, for example, transferable from one contractual setting to another and indeed from one contract to another; once paid, the benefit of the payment continues to the mutual advantage of traders.

One virtue of this simple exchange economy presentation of aggregative transaction costs is that, with economy of explanation we can proceed some way toward specifying the incidence of transaction costs in an economy involving both producer-traders and consumer-traders - that is, a general equilibrium (GE) model of transaction costs. Certainly the most important characteristics of the transaction costs incurred in trade are represented in the above formulation. It is clear, for example, that the movement toward exchange equilibrium requires a degree of <u>divisibility</u>. A further virtue of the analysis is that it enables the reader to distinguish in his own mind the difference between the 'set-up' costs in marketing or trading (what we saw Franklin Fisher refer to earlier as the 'transaction constraint') from transaction costs. Quite simply, the set-up costs incurred before the first trade are the costs of arranging for the first experimental 'swap' to take place. They are not themselves assumed to be perfectly divisible. Indeed, were they so to be then exchange might take place before the market opened, which naturally violates a conventional assumption that trade between traders A and B only takes place through an intermediary market which chooses its trading hours. However, as we shall see later, the divisibility of costs of exchange is very difficult to assess historically, so that the separation of transaction costs from set-up costs proves very difficult to achieve using the criterion of divisibility alone.

One might suppose that only a definition of set-up costs (or transaction constraints) is required to establish the distinction between them and transaction costs. The most obvious distinction between the two is that transaction costs are continuous throughout the economy but that particular set-up costs are discrete and specific to a part of the market. However, this definition carries with it the potential to confuse set-up costs (literally the sunk costs of trading) with other fixed costs in the long run. Rather, it is necessary to hold to an explanation of market operation that allows set-up costs - whilst clearly non-recoverable - to be transferred to a subsequent trade by, for example, moving physical location or the nature of face-to-face trade.

To summarize the analysis of transaction costs in partial equilibrium thus far, we have stated the outcomes of trading with and without set-up costs and have witnessed a distinction between set-up and transaction costs themselves. Earlier, we attempted to illustrate rather than rigorously prove the existence of transaction costs in bilateral trade using the simple analytics of exchange theory. We have merely stated what traders' welfare schedules will look like in the form of indifference curves; we have been required to state formally maximizing objectives for traders A and B because a move toward equilibrium is mutually advantageous without involving a recalculation of the preference functions for each trader. Naturally this 'finger exercise' in the analysis of transaction costs has not required the more substantial apparatus of the general equilibrium theorist - such as statements about consumer or producer preorderings over possible trades - for we have merely stated that preferences

exist. Indeed, in this account of the existence of transaction costs the concept of 'negotiation costs' first developed for analytical purposes by Buchanan and Tullock [1] has been extended to allow for the differentiation of set-up costs from discrete transaction costs using the analytical techniques more commonly ascribed to welfare theory. As presently described this cannot be a sufficient model for the formal specification of transaction costs and a further explanation must develop the full general equilibrium theory of producer-consumer trade and production with transaction costs [2].

The economic theory of general equilibrium (GE), by comparison with that of exchange equilibrium, is concerned with the simultaneous equilibrium of producing and consuming activities and thus with the maximization of profit as well as utility. Because of the technically sophisticated nature of GE theory, much of what follows may appear difficult or abstract to the historian. In general terms, however, the reader should be assured that he has already covered much of the necessary ground to appreciate the GE account of transaction costs and a brief sketch of the method will suffice to explain it. In the stead of consumer-swappers, GE theorists place consumer-producers - assuming

[1] James Buchanan and Gordon Tullock The Calculus of Consent (Ann Arbor, 1965). Similarly, the presentation here draws on the micro-theory of 'disagreement costs' developed in John G. Cross The Economics of Bargaining (New York and London, 1969), Chp.6. See also App. 1 below.

[2] For attempts to distinguish between set-up and transaction costs in GE models see variously Walter Heller 'Transactions with Set-Up Costs' Journal of Economic Theory. 4 (1972), 465-78; Seppo Honkapohja 'Studies in the General Equilibrium theory of Money and Transaction Cost' Annales Academiae Scientiarium Fennicae, Dissertationes Humaniorum 21 (Helsinki, 1979); and, latterly, Raefael Repullo 'The existence of equilibrium without free disposal in economies with transaction costs and incomplete markets' International Economic Review, 28 (1987), 275-90.

thereby that the goods swapped can be used in new production, that the labour or capital of both A and B can be hired out for production and that both stock-holding and saving are possible. In this sense the GE model provides a most realistic, if mathematical, setting for the analysis of transaction costs. However, as we shall see, there are reasons to believe that the relatively elementary forms of analysis offered by the GE economist to date are unable to take us much further in discovering an historically relevant approach to transaction costs. Before proceeding further to analyse the general equilbrium consequences of the

existence of transaction costs, however, it is necessary to explain the relationship between generalised and partial equilibrium models of economic behaviour and the qualities of the general equilibrium analysis of transaction cost that influence perceptions of economic theorists about the structure and nature of the transactions sector. Naturally, this implies a familiarity with the general equilibrium (GE) methodology which has, perhaps more markedly than any other strand of economic theory in recent decades, come to view the transactions cost of exchange in Walrasian tatonnement bargaining as central to an understanding of the theory of production as well as the theory of exchange [1].

Fundamentally an extension of the Walrasian tradition of the analysis of equilibrium states, the most significant characteristics of the archetypal GE model of the equilibrium of market demand and supply across all markets are its rigour and computability. In its definition of economic equilibrium, the Arrow-Debreu (A-D) conceptualisation of general (economy-wide) economic equilibrium adopts a method quite foreign to that familiar to most economic historians in an effort to be both precise and mathematically concise. Equilibrium, in the Walrasian tradition, is regarded by GE scholars as historically 'evidenced' only by price-relative stability and the collusion of buyers and sellers at 'equilibrium prices'. This equilibrium point is neither morally 'good' nor 'bad', but is rather instantaneous and yet existential. The GE paradigm emphasises the existence rather than attainment of equilbrium for:

[1] The standard introduction, Kenneth Arrow and F.H.Hahn Competitive Analysis (San Francisco and Edinburgh,1971) is accessible for the mathematically able.

> When we use an equilibrium concept we are singling out a subset of possible states of the economy for special attention. To say that an economy is in equilibrium is only of interest if it excludes other possible states of the economy. That is why we need existence proofs and why it is not a fruitful use of equilbrium to assert that only equilibrium states are possible [1].

The equilibrium postulated by the GE paradigm is therefore conjectural and not historically verifiable. Rather, the GE theorist is interested in ascertaining the conditions necessary for the attainment of (even temporary) equilibrium. As such the GE theory of transaction costs offers a very different perspective from those encountered thus far.

The definition of transaction costs in general equilibrium theory begins by defining a 'transactions set' similar in character to the Arrow-Debreu (A-D) consumption set (a set of choices which may be made under specified circumstances) and fully conformable with the conditions of general equilibrium. The 'transactions set' is said to be 'closed' (there is a finite number of possible choices) and 'convex' (choices between goods 1 and 2 and combinations of 1 and 2 can yield identical levels of utility). Any point within the transaction set can be specified by vectors of purchases, sales (according to a profit function) and resources used in exchange [2].

[1] Frank Hahn Equilibrium and Macroeconomics (Oxford, 1984).

[2] This somewhat tortuous shorthand, in keeping with the set-theoretic character of GE derived from Debreu's specification of a consumption set (Gerard Debreu Theory of Value (New York, 1959) Chp.3), captures the fundamental features of the choice set of transaction technology. A fixed point theorem is used to identify a unique (general) equilibrium. The only accessible presentation of the full theory of transaction costs in general equilibrium using such an apparatus is Repullo, 'Existence of equilibrium without free disposal', theorems 3.1 and 3.2; W.P. Heller and R.M. Starr 'Equilibrium with non-convex transaction costs: Monetary and non-monetary economies' Review of Economic Studies. 43 (1976), 195-215. Economic historians are unlikely to find set theoretic GE very inviting and hereafter all references to results will be expressed in non-mathematical terms.

Equilibrium in this stylised A-D economy turns out to determine the content of the final consumption set with respect to the transaction set. Whether, as in Kurz's exposition [1], this suggests we specify 'norms' of behaviour with respect to transaction costs in the absence of (even ill-defined) preference 'pre-orderings', or as in Foley's earlier model we allow the derivation of the equilibrium conditions for A-D economies with respect to production through an indirectly specified profit vector (π) [2] or, in Hahn's sequence market model, we require the specification of a single exchange 'technology' for all period markets [3], the basic characteristics of A-D GE models of the incidence of transaction costs are the same. As in all GE models, general equilibrium is derived from fully specified, pre-ordered, choice sets for consumers and producers who observe Walras' Law, have transitive preference orderings with respect to producer goods, satisfy the normal non-satiety assumption and, most significantly, prefer to transfer the payment of costs associated with purchase to others.

In dealing with transaction costs, GE scholars have been less strictly bound by these convexity assumptions common to A-D models of the consumption and production sets. Some of the earliest GE formulations simply ignored the possibility of non-convexity in the transactions set. Producers in Foley's description of equilibrium in an A-D economy, for

[1] Moredecai Kurz 'Equilibrium in a finite sequence of markets with transaction costs' Econometrica, 42 (1974), 1-20; idem. 'Equilibrium with transaction cost and money in a single market exchange economy' Journal of Economic Theory, 7 (1974), 418-452.

[2] Duncan K.Foley 'Economic equilibrium with costly marketing' Journal of Economic Theory, 2 (1970), 276-291.

[3] F.H.Hahn 'Equilibrium with transaction costs' Econometrica, 39 (1971), 417-439.

example, maximize profits with respect to the consumers' orientation toward their products, which in turn is influenced by the consumer pre-ordering [1]. However, GE scholars have more frequently simplified the modelling exercise by assuming, contrary to our earlier formulation of the nature of transaction costs, that the transactions set is non-convex (that is to say, transaction costs are mainly of the 'set-up' cost type and are therefore merely a constraint upon the attainment of GE) [2]. As a result, in the formulation of a theory of the transactions sector, GE theory assumes that transaction costs are absolutely indivisible. In some senses of course this is merely the polar opposite of the Coasian assumption that transaction costs are completely divisible. But the assumption of absolute indivisibility does not end there. A further necessary condition for competitive equilibrium in an A-D exchange economy recognized implicitly by Hahn and, formally, by Cornwall [3] is that all markets need to be open though not necessarily active. Time, similarly, is not divisible in the transaction set.

Furthermore, the aggregation of transaction cost in the A-D economy is exactly analogous to the general equilibrium analysis of aggregate demand. Just as economic agents in tradable markets will seek to equate demand and supply at notional equilibrium prices, so too an equilibrium of buying and

[1] Foley, 'Economic equilibrium with costly marketing', especially theorem 4.1, pp.282-3.

[2] Reviewed in Heller and Starr 'Equilibrium with non-convex transaction costs'

[3] R.R.Cornwall 'Marketing costs and imperfect competition in general equilibrium' in G.Schwodiauer (ed) Equilibrium and Disequilibrium in Economic Theory (Dordrecht, 1977), 239-254; Hahn 'Equilibrium with transaction costs'.

selling prices in the Foley-Kurz account of transaction costs and technology indicates the presence of equilibrium activity and transaction costs in exchange. Yet in the earliest transactions technologies written by general equilibrium theorists, the bilateralism of exchange was not reflected in bilateral shares of transaction cost. In the words of Professor Hess:

> The Foley model assumes that consumers perform none of the intermediary roles themselves. They always buy at the higher price and sell at the lower price. The marketing activities...are carried out by profit maximizing producing agents [1].

The spread of buying and selling prices in the simplest transaction cost model mirrors the equation of aggregate demand and aggregate supplies offered written, in Walrasian fashion, as a vector of prices in general equilibrium. In more recent accounts of money and transaction cost the general spirit of the Foley-Kurz model is carried forward and again there appears to be no bifurcation in the incidence of transactions costs. In short, the general equilibrium account of transaction costs presently has little or nothing to say about the distribution of transaction costs between agents in single, multiple or sequential markets.

The most significant criticism of the existing literature within the A-D paradigm, however, relates to the nature of transaction 'technologies' allowed by the Foley-Kurz model. As has been noted, of principal importance, though often neglected, is the assumed perfect divisibility of the transaction sector resources used in exchange. The divisibility issue creates most problems in relation to the specification of bundles of

[1] James D. Hess The Economics of Organisation (Amsterdam, 1983), 39.

completed exchanges and one solution is to represent the degree of divisibility associated with a transaction technology by the institution operating it. Neoclassical theorists commonly adopt the heuristic of assuming that institutions and their rules actually embody the transactions technology required to attain equilibrium. This neoclassical solution is perhaps the only solution currently available, although both its use and elaboration extend beyond the limits of the present survey. Suffice it to say that as observed earlier the degree of divisibility of the transaction mechanisms in the economy does not depend to any considerable degree upon the size of the so-called 'set-up' costs in marketing and that, contrary to the orthodoxy of assumed non-convex transaction sets in GE models (after Heller), it is difficult to avoid holding to our first intuition that divisibility exactly defines the nature of transaction sector costs.

Yet these criticisms of the A-D transaction sector apply only to the existing and very elementary elaborations of general equilibrium models with transaction costs. Indeed, the very elementary nature of much of the analysis of the transaction sector indicates the problems in framing a workable model of producer and consumer actions in the light of transaction costs.

Whilst we have thus far regarded transaction costs as a feature of elementary partial equilibrium models or general equilibrium models of economic behaviour and have concentrated upon the determination of economy-wide equilibrium in the presence and absence of transaction costs, little has been said of the most commonly understood theory of transaction costs.

Associated with partial equilibrium neoclassical theory of a variety particularly popular in the United States, the 'pure neoclassical' theory of property rights starts from the assumption that economic efficiency is indicated by market clearing and not by price vector shifts; that the holding of unsold stocks may signal price effects rather than price effects always and only signalling stockholding activity. The familarity of this approach means that it should not require further elaboration of its fundamental character (introductory accounts feature in most undergraduate university textbooks); however the importance of this popular and much favoured non-Walrasian approach to economic dynamics does lead its supporters to frame a quite different theory of property rights in which transaction costs represent not simply the costs of using the exchange mechanism but rather the opportunity costs of market trade itself. It is worth examining the views of those neoclassicals in the tradition of J.B. Clark labelled the 'Chivirla' economists by John Burton - named after the principal locations in which the neoclassical application of the Coasian theory of property rights was taught and studied in the early 1970's, Chicago University, Virginia Polytechnic Institute and the University of California Los Angeles [1] - whose approach to the economics of transaction costs is significantly different from those we have encountered thus far and whose influence upon historians' perceptions of transaction

[1] John Burton 'Externalities, Property Rights and Public Policy: Private Property Rights or the Spoilation of Nature' in Steven N.S.Cheung The Myth of Social Cost:a critique of welfare economics and the implications for public policy IEA Hobart Paper 82 (London, 1978), 76. Those unfamiliar with varieties of neoclassical theory and the evolution of property rights theories since Clark may consult Louis de Alessi 'Property Rights, Transaction Costs and X-efficiency: an essay in economic theory' American Economic Review, 73 (1983), 65-66; Victor P.Goldberg 'Commons, Clark and the emerging post-Coasian law and economics' Journal of Economic Issues, 10 (1976), 877-894.

costs has been greater than those alternative formulations we have examined up to this point. The choice of the descriptive title for this group is merely convenient; certainly not all students of the neoclassical theory of property rights either attend or work in these institutions. Nevertheless, the choice of academic affiliation rather than any intellectual category for this group seems best. Neither Rowley and Peacock's denotation of them as 'Public Choice Paretians' [1] nor Mark Blaug's description of them as 'Positive Paretians' [2] seem to exactly specify their concerns, save to indicate their obvious though informal relationship with those public choice theorists whose work has focused on allocative questions where property rights assignments have largely been eradicated and where transaction costs are usually assumed to be zero. Langlois' tentative designation of them as 'comparative-institutionalists' [3] alone is entirely inappropriate for, as we shall see, the Chivirla and neoinstitutionalist approaches to PRTC are largely though not entirely incompatible and, if anything, Chivirla economists definitively reject any form of institutional analysis which does not regard institutions as constraints upon the individual utility function as shall be demonstrated. In fact it is the Chivirla approach to the incidence of transaction costs and the assignment of property rights that has become the most favoured and the most frequently used analytical device in transaction cost

[1] Rowley and Peacock Welfare Economics, 104-108.

[2] Mark Blaug The methodology of economics, or how economists explain (Cambridge, 1980), 143-146.

[3] Richard N. Langlois 'Internal Organisation in a Dynamic Context: some theoretical considerations' in Meheroo Jussawalla and Helene Ebenfield (eds.) Communication and Information Economics: New Perspectives (Amsterdam, 1984), 23.

historiography although there appears to be little evidence that economic historians are aware of the problems involved in using of the approach to property rights developed by Chivirla school theorists.

The economic analysis of efficient markets, which is the prime concern of neoclassical economic theory, suggests a very different approach to the economics of property rights from the GE paradigm. As a part of the theory of economic externality, Chivirla transaction cost economics concerns itself with identifying the conditions in which internalisation of an external effect will prove appropriate. Its formulation of the phenomenon of transaction costs is an attempt to explain the role of external effects in causing market failure - but unlike the formulation developed by Coase, it seeks to explain not the fact of internalisation (and thus organisational change) but the conditions in which it is optimal. In efficient markets, external costs should always be counteracted by sufficient beneficial effects from the internalisation of the harmful consequences of production. For example, the efficient market will compensate those suffering the effects of pollution from producers' activities up to the point at which the marginal profit from producing the next unit of output exactly equals the cost of compensating an affected party for each producer. Thereafter, the rational maximising producer will find it more advantageous to himself to internalise the external effect costs by, for example, taking over the property rights of the affected party. In the form of a rational choice rule, we might say with Demsetz that

> ...property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization...[1].

[1] Harold Demsetz 'Toward a Theory of Property Rights' American Economic Review, Papers and Proceedings, 57 (1967), 350.

Consequently organisational change occurs on the basis of a rational calculus of the costs and benefits of externality internalising activity.

One general conclusion of this particular analysis of the property rights consequences of external effects is that organisational change is motivated, like every other form of economic behaviour in the neoclassical model, by self-seeking rational behaviour. Property rights become transfered, adapted and incorporated into other institutional structures when and where it proves efficient in some absolute sense so to act. It is hardly surprising therefore that the Chivirla approach to this extension of Coasian framework makes much use of the device of cost-benefit analysis [1]. Early Chivirla analytical writings suggested that transaction costs were the penalties paid by society for the friction within an economy caused by the misalignment of the social costs and social benefits from the market allocation of goods and services. In the form of a critique of Pigouvian welfare theory the Chivirla school's early work on transaction costs proceeded from the observation of Coase that the absence of transaction costs was a prerequisite for the allocation of resources to their optimal use or (which means the same thing) to the point at which their market price and their welfare value would be one and the same [2].

[1] Especially in Harold Demsetz 'Some Aspects of Property Rights' Journal of Law and Economics, 9 (1966), 61-70 ; idem. 'Towards a Theory of Property Rights', 347-359; idem.'The Exchange and Enforcement of Property Rights' Journal of Law and Economics, 7 (1964), 11-26; Armen Alchian and Harold Demsetz 'Production, Information Costs and Economic Organisation' American Economic Review, 62 (1972), 772-795.

[2] In other words the marginal rates of substitution for money and goods would be equal at one optimal point within the consumption set described by the indifference curves of buyers and sellers.

Chivirla theorists make use of the apparatus of welfare theory to justify their subsidiary, and prescriptive (policy) claim that the reduction in transaction costs associated with the definition, enforcement, policing and control of property rights allocations will bring about stable equilibrium. Defining the equilbrium level of transaction costs as that state in which marginal costs (MC) are exactly equated with marginal benefits (MB) of property defining activity, Chivirla economists regard excessively costly transaction costs as inimical to the welfare efficiency of an economy. The marginal benefit from transaction cost payments - the attainment of welfare enhancing exchange and general increase in the level of total utility - will be equated with the marginal cost of employing resources to undertake those tasks necessary to allow all possible welfare enhancing exchange and production to occur. The opportunity cost of these resource costs incurred in returning the economy to the equilibrium level represents a real loss of productive output and consequently of welfare. So only where MB=MC will transaction costs be reduced to zero or, more precisely, only in an economy of zero transaction costs will it prove possible to attain true equilibrium prices.

> Zero costs of transaction then implies that one can write a contract containing as many stipulations as desired, all fully enforced, without expense. In such a world (abstracting from transport, storage and so forth) there would be no spread between retail and wholesale prices, or between selling and buying prices; they become identical. Conversely, the use of a single price...implies zero costs of transacting [1].

[1] Yoram Barzel 'Some Fallacies in the Interpretation of Information Cost' Journal of Law and Economics. 20 (1977), 292.

The 'social equilibrium' of marginal costs and marginal benefits in the Chivirla account represents the equalisation of on the one hand the combination of enforcement and 'rights-defining' activity and on the other the resulting benefit from the allocation of property rights using the resources for enforcement and property rights assignment [1]. The benefit gained from moving toward this 'social equilibrium' is regarded as having been redistributed from the sum of potential private benefits from the holding of exclusive rights over resources or properties. It has been argued - as we shall see - that this observation is trivial and that only the analysis of the welfare implications of property reassignment in terms of the subsequent initial allocations would yield relevant results [2]. However the significant product of the attainment of the 'social equilibrium' is stated to be precisely that new allocations based upon native bargaining powers becomes possible. In the words of Harold Demsetz:

> In such a world it will be bargaining skills and not market structures that determine the distribution of wealth...[t]he coexistence of monopoly power and monopoly structure is possible only if the costs of negotiating are differentially positive, being lower for one set of sellers (or buyers) than it is for rival sellers (or buyers) [3].

More cynically, this neoclassical world of zero transaction costs has implications for the type of economic structure one would expect to evolve: '...in such a world growth is not a problem, its rate being simply a

[1] Illustrated in Terry L.Anderson and P.J.Hill 'The Evolution of Property Rights: A Study of the American West' Journal of Law and Economics, 18 (1975), 165.

[2] Warren J. Samuels 'The Coase Theorem and the Study of Law and Economics' Natural Resources Journal, 14 (1974), 1-33.

[3] Harold Demsetz 'Why Regulate Utilities ?' Journal of Law and Economics 11, (1968), 61.

function of the number of children people have and the rate of saving' [1]. The tendency of the economy toward this state as the result of the working out of some encoded logic of human agency suggests that the historical study of the evolution of human society as a whole is in reality the study of the failure of men to understand the inevitable optimality of rational, reactive, economic agency through pure exchange systems with costless supporting arrangements for property rights transfer and definition. It is in this respect that the Chivirla paradigm approaches classical theory in its form and empirical predictions.

What does this analysis imply for any form of applied economic study ? First the Chivirla approach suggests a definitive methodological approach to property rights. The Chivirla version of the Coasian method approaches the phenomenon of high transaction costs and similar negotiating disabilities in contracting as a part of a large class of market inefficiency-producing factors which includes generalised externality and - as subclasses of external effects - monopolistic and public goods allocation [1], unique patents [2] and an undersupply of relevant

[1] Douglass C.North 'Institutions, Transaction Costs and Economic Growth' Economic Inquiry, 25, (1987), 419.

[2] Carl Dahlman 'The Problem of Externality' Journal of Law and Economics 22, (1979), 141-162.

[3] Jack Hirschleifer 'The private and social value of information and the reward to inventive activity' American Economic Review 61, (1971), 561-74.

information [1]. All such forms of market inefficiency behave like the better known forms of external effect; just as costly externalities imply market inefficiency and therefore long-run institutional instability so too the existence of high transaction costs implies that current institutional arrangements lack the permanence associated with perfect market conditions and with zero transaction costs [2]. Within the variety of economic systems Chivirla economists presume to be characterised by any of the sources of market failure they identify efficiency will be relative and not

[1] Yoram Barzel, 'Some Fallacies', 291-307. It is unclear whether natural monopolies resulting from natural endowments are to be included here; logically they should be excluded for command over them has no opportunity cost for those without access to them but few accounts from within the Chivirla school convincingly deal with the problem. One is reminded of Dennis Robertson's happy observation on Marshall's treatment of rent '...not 'entering into' cost, a phrase which always conjures up to my mind a stately temple labelled Costs of Production with poor Rent standing disconsolately on the mat outside!' (Dennis Robertson Lectures on Economic Principles (London,1963), 204); post-Coasian neoclassical theorists of transaction cost have an equal disdain for naturally occurring imperfections of the market when including elements of market failure in the temple of transaction cost.

[2] Harold Demsetz 'The Cost of Transacting' Quarterly Journal of Economics. 82 (1968), 34.

absolute. Consequently statements about the relative efficiency of various historical economies is dubious; only the comparison of the efficiency of their transaction-enabling technologies (or, more precisely, their mechanisms for minimising aggregate transaction cost) will provide an appropriate guide to the develop of economic organisation and factor use.

In the Chivirla account institutional change results from the attempt to reduce all classes of generalised external effect, including transaction costs. As a result the existence of these signs of market inefficiency seems historically implausible. Institutions continue to adapt themselves to meet the requirements of the perfect market model until no further adaptation is necessary and proves merely a costly inconvenience and incurs organisational diseconomies. One obvious implication of this is that economic historical study itself becomes an irrelevance and a mere superfluous commentary upon the working out of the rational behaviour of individuals agents for the economist. To rescue historical economics from the oblivion to which Chivirla economists wish to consign it requires a clearer understanding of the content of the partial equilibrium theory of PRTC than has heretofore been available [1]. It is this theme that will be developed in the following chapter.

[1] The voluminous publications of Douglass North to date have effectively been an attempt from within the neoclassical fold to achieve exactly this. See particularly, Structure and Change in Economic History (New York, 1981); idem. 'The theoretical tools of the economic historian' in Charles P. Kindleberger and Guido di Tella (eds.) Economics in the Long View: Essays in Honour of W.W.Rostow (London,1982) volume 1, 15-26; idem. 'Transaction costs, institutions and economic history' Zeitschrift fur die gesamte Staatswissenschaft, Bd. 140, heft 1, (1984), 7-17. It should be noted, however, that none of the observations made below in our attempted critique of Chivirla PRTC theory have been explicitly stated by North in this literature.

CHAPTER THREE: INSTITUTIONAL ECONOMIC HISTORY AND POST-COASIAN VARIANTS OF THE TRANSACTION COSTS THEORY OF ORGANISATIONAL CHANGE.

> 'The new institutional economics is preoccupied with the origins, incidence, and ramifications of transaction costs. Indeed, if transaction costs are negligible, the organization of economic activity is irrelevent, since any advantages one mode of organization appears to hold over another will simply be eliminated by costless contracting' [Oliver Williamson, 1984].

We have seen that the modern (and largely neoclassical) theory of transaction costs is based in large measure upon acceptance of the so-called Coase theorem, a theorem which states that in the absence of transaction costs and motivated solely by considerations of market efficiency in the use of resources in their most productive setting, a Pareto optimal allocation of resources would result from exchange regardless of the initial allocation of property rights and the legal allocation of rights. In the presence of external effects, indeed, market efficiency and Paretian welfare criteria will be met through trade if transaction costs are reduced to zero. The economy operating in the absence of such transaction costs is thus free to operate with the limitless resources for marketing allocated to all traders in the absence of such marketing costs and attain intertemporal and general equilibrium in product and factor markets. The attainment of economy-wide equilibrium in this manner is thus entirely the result of rational profit maximizing behaviour in a perfect market. The normative and prescriptive corollary of this theorem is evident: only by freeing markets from the controls which hinder the assignment of resources to their optimal use can an efficient market economy be created. It is, then, not surprising that non-Coasian

versions of transaction cost theory often begin by analysing the role of this 'theorem' in the neoclassical theory of transaction costs.

The most damaging criticisms of the Coase theorem itself have concerned the elegance and economy of the argument most prized by its champions. Specifically it has been suggested that the theorem is tautological in character. Far from being a scientific deductive exposition of the real forces which shape the assignment of resources through trade, the Coase theorem makes the existence of transaction costs dependent upon the character of economic life: it is asserted that the Coase theorem implies a definition of the efficient market which crucially depends upon the level of transaction costs whilst the definition of transaction costs offered by Coase similarly depends upon an already determined level of economic efficiency [1].

Other economists have gone further by arguing that the historical implausibility of market perfection is confirmed by experience. There have always been transaction costs in exchange and their reduction to zero would in fact prove unattainable for there would be no substantive economic

[1] This criticism of the Coase theorem can occasionally be traced in a substantial literature. See particularly Guido Calabresi and Douglas Melamed 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' Harvard Law Review, 85 (1972), 1094-5; E.J.Mishan 'Reflections on Recent Developments in the Concept of External Effects ' in Welfare Economics : Ten Introductory Essays (New York, 1964), 218-223; Mark Kalman 'Consumption Theory , Production Theory and Ideology in the Coase Theorem' Southern California Law Review, 90 (1979), 1023-45; 'Introduction' in D. Francis et al Power Efficiency and Institutions: A Critical Appraisal of the 'Markets and Hierarchies Paradigm' (London,1983). (On more general tautology in the economic theory of property rights, see Issac Erlich and Richard A. Posner 'An Economic Analysis of Legal Rule Making' Journal of Legal Studies, 3 (1974), 282 n.87).

system within which to make repetitive transactions. Using evidence gathered from game theory or real-time experiment on human subjects, the applicability of the Coase theorem has been subjected to a variety of types of analysis many of which suggest that the very complexity of multiple agent economies implies ineradicable transaction costs. Some costs of transaction cannot therefore be reduced and any institutional adaptation seeking to achieve their reduction through the internalisation of external effects or the reassignment of property rights to alternative institutional structures of ownership will prove to be frustrated.

There are two essentially different but structurally similar criticisms worth regarding here. First, following Wellisz and Knesse [1], some economists argue that in relation to public goods externalities - a major class of market failure in modern and historical economies - there is an incentive for victims of some external effect to misrepresent their own preference for a reduction in the economic impact of the externality and to seek to lower their own contribution to any abatement transfer to the polluter; and if enough victims act in this way , resources will continue to be allocated inefficiently. Using a prisoner's dilemma strategy in multi-party externality cases does not result in optimal allocation. In short, rational public 'free riders' may actually prevent the assignment of property rights to their Pareto-optimal and therefore efficient level. The

[1] Steven Wellisz 'On external diseconomies and the government-assisted invisible hand' Economica, 31 (1964), 345-62; G.A. Mumey 'The 'Coase Theorem': a reexamination' Quarterly Journal of Economics, 85 (1971), 718-23. Kenneth Arrow has more conventionally and thoroughly illustrated the point in terms of the information requirement in bargaining toward Nash equilibrium in 'The Property Rights Doctrine and Demand Revelation under Incomplete Information'in Melvin J.Boskin (ed) Economics and Human Welfare : Essays in Honor of Tibor Skitovsky (New York, 1979), 23-39.

second line of criticism of the real-world applicability of the Coase theorem is really an extension of this observation, for it is intended to apply - like the Coase theorem itself - to all classes of market failure. The game theoretic models developed by Aivazian and Callen, Woj, Kalman and Samuelson all suggest that in repetitive, multi-agent, games transaction costs cannot be reduced by the intertemporal reassigment of property rights [1]. With more than two players (polluter, victim and government, for example) bargaining may include some elements of bribery or side-payments or public good free-riding. Multi-agent scenarios of this variety turn out, not surprisingly, not to be amenable to analysis by means of the Coase theorem. From within the neoclassical fold, these criticisms suggest the historical implausibility of the attainment of zero transaction costs and therefore their 'natural' occurrence within the trading and producing economy has to be recognized as a permanent rather than a temporary, eradicable, feature of human economic systems.

[1] Notably Varou Aivazian and Jeffrey L. Callen 'The Coase Theorem and the Empty Core' Journal of Law and Economics, 25 (1981), 175-81; Carolyn Woj 'Property Rights Disputes: Current Fallacies and a New Approach' Journal of Legal Studies, 14 (1985), 411-423; Mark Kalman Spitzer and Hoffman on Coase: A Brief Rejoinder' Southern California Law Review, 53 (1980), 1215-1223; William Samuelson 'A Comment on the Coase Theorem' in Alvin Roth (ed.) Game-Theoretic Models of Bargaining (Cambridge, 1985), 321-339. See Hans van den Doel Democracy and welfare economics (Cambridge, 1979), 87-90 where similar arguments are made in relation to other public choice issues. In relation to so-called 'pure entitlement systems', see Edward J. Green 'Equilibrium and Efficiency under Pure Entitlement Systems' Public Choice, 39 (1982), 185-212, esp. Appendix B, pages 208-9.

The second substantive criticism of PRTC method and of the Coase theorem relates to the central role played in both by the analysis of the utility maximising strategy of individual agents. Earlier, in Chapter 2 above, we saw how the analysis of transaction cost was built upon the analysis of exchange and welfare and, in particular, upon the perception that constraints existed to efficient and mutually beneficial bargaining. This interpretation suggests that evidence of the successful internalisation or eradication of transaction costs will be found in the calculation of the benefits to each individual of exchange. Critics, like Furubotn and Pejovich, point out that in PRTC method, and in the Coasian analysis in particular:

> ...the utility function is associated with the particular decision-maker, and specifically empirical content is introduced into the function...Attention is concentrated on the objectives of the individual, not on those of the organisation. The latter comes into the analysis as a limiting factor or contraint; different property rights assignments lead to different penalty-reward structures and, hence, determine the choices that are open to decision-makers... Consider, for example, the discussion of the modern corporation. Instead of treating the firm as the unit of analysis and assuming that the owners' interests are given exclusive attention via the process of profit maximisation, the utility maximising model emphasizes individual adjustment to the economic environment and seeks to explain the firm's allocation and use of resources by observing individual actions within the organisation [1].

The emphasis upon the effects of transactions costs as contraints upon the choices of individuals is, it is argued widely, quite out of keeping with a theory which claims to be able to represent the logic of organisational change. In particular, the centrality of the utility maximizing model in the Coase theorem - with it's narrow focus upon the decisions of individuals - has led many critics to reject it as the basis for the study of institutional problems.

Eirik G. Furubotn and Svetozar Pejovich 'Introduction: The New Property Rights Literature' in Eirik G.Furubotn and Svetozar Pejovich (eds,) The Economics of Property Rights (Cambridge, Mass.,1974), 2-3.

What is important about these various neoclassical criticisms of the Chivirla approach to PRTC theory is that they centre upon the usefulness of the Coase theorem as the basis for a theory of private goods allocations. As such the analysis offered by critical economists appears to be narrowly technical and, for the historian anxious to participate in the debate surrounding the reinterpretation of the role and creation of institutional diversity in the economies of the present as well as the past, they may seem a little too pedantic and inessential. Yet the very importance of the Coase theorem in the PRTC account of the process of institutional change and of transaction cost means that historians must be aware of the implications of this apparent thread of critical comment based as it is not upon the wholesale rejection of Coase's elementary observation that there is a cost to using the price mechanism but rather upon the analysis of the implications of the more general theorem associated with his name. It will be admitted that the quarrel some neoclassical economists have with the central place of the Coase theorem in the PRTC account of institutional change is not with the special features of the theorem which colour the PRTC account of institutional change alone but rather focuses upon the implications for the analysis of market processes in the narrowly technical sense. But by far the majority of critical responses from this same quarter have concerned the implications of the theorem, the implications of the theorem and of the method of PRTC analysis to the study of institutional behaviour.

The PRTC theory developed by Chivirla economists depends more heavily than most upon unqualified assent to the utility and integrity of this theorem; by contrast alternative theories of transaction cost develop an approach which demands less rigorous adherence to the Coase theorem and are consequently less likely to be confounded by the type of theoretical problems identified here. Neither the 'new institutional economics' associated with the name of Oliver Williamson and others nor the 'neoinstitutionalist' approach to PRTC developed in the course of the 1970's depend to any very great extent upon the Coase theorem although, as we shall see, both make some considerable virtue of their own critique of the theorem in an effort to develop an alternative to those formulations we have already encountered.

A product of the severe censure of the centrality of the Coase theorem by conventional, non-Chivirla, neoclassical economists has been the growing realisation that a thorough PRTC theory must develop from the normative rather than the positive side of Coase's exposition. From the 1970's - and quite without reference to contemporary developments in GE (notably the discovery of the stability of equilibrium with transaction costs under non-convexity assumptions for the transactions set) - Oliver Williamson, latterly at Yale, developed an alternative 'neo-neoclassical' theory of the firm which took account of neo-behaviourist criticisms of neoclassical theory and extended the analysis of business decision-making developed in

the 1960s by Herbert Simon [1]. This Williamsonian PRTC theory stands in apparent opposition to the Chivirla theory encountered earlier for, in Williamson's own words

> Neoclassical economics, which regards the firm as a production function, holds that non-standard forms of organisation have monopoly purpose and effect. Transaction cost economics, which regards firms, markets and hybrid 'mixed modes' as alternative governance structures, maintains instead that the institutions of contract ought mainly to be regarded in economizing terms. Assigning transactions to governance structures in such a way is what transaction cost economics is all about [2].

For Williamson, alternative 'hierarchies' to the market form beloved of neoclassical theory - such as firms, divisionalised bureacracies in centralised states or, centralised economy planning autarchies - are caused to be created as a result of transaction costs. In the somewhat confusing language of Williamsonian PRTC theory, 'transactions' - as

[1] First in 'The vertical integration of production: market failure considerations' American Economic Review, 61 (1971), 112-123; idem. 'Markets and hierarchies: some elementary considerations' ibid., 63, (1973), 316-25; idem. Markets and Hierarchies: Analysis and Antitrust Implications (New York,1975). Williamson only cleared up some of the obfuscation of his earlier version of PRTC theory in 'Transaction-cost economics: the governance of contractual relations' Journal of Law and Economics, 22 (1979), 3-61 and his most recent comprehensive statement, The Economic Institutions of Capitalism : Firms , markets, relational contracting (New York,1985), must be taken to represent the most complete exposition of his approach after nearly a decade of scholarly debate.Williamson's work in the fields of industrial economics and the economics of institutions may be regarded as one of a number of contributions to a 'new industrial organisation' theory developed largely in the late 1970's and 1980's in an attempt to find an alternative to conventional 'structure-conduct-performance' type models of industrial (firm) behaviour and to account for the diversity of industrial and contractual forms of economic institution.On the rich vein of new theory (based upon extensive work in non-cooperative game theory in the main) the economic historian is advised to consult Alexis Jacquemin The New Industrial Organisation : Market Forces and Strategic Behaviour (Oxford, 1987) and Richard Schmalensee 'The new industrial organization and the analysis of modern markets' in W. Hildenbrand (ed) Advances in Economic Theory (Cambridge, 1982), 253-285.

[2] Oliver E. Williamson 'Corporate Governance' Yale Law Review, 93 (1984), 1201.

individual contractual arrangements within the structure of institutional devices [1] - become 'assigned to and organized within governance structures in a discriminating (transaction cost economizing) way' [2]. Williamson avers that transactions are 'matched' to governance structures according to three principal characteristics, all of which are inherited from the neoclassical formulation of Demsetz and others, namely the specificity of an asset (that is, the unique features of the asset which make it less transferable to other uses), the frequency with which transactions occur and the level of opportunism (or 'cheating') resulting from uncertainty [3]. Governance structures can be identified which ideally (optimally) correspond to these characteristics; and while the first two characteristics are assumed to elicit characteristics in the governance structures which correspond to the ex ante costs of organisation, the opportunism of individual agents warrants structures of governance which minimise other costs ex post - such as the costs of monitoring transactions and ensuring that individual sources of economic rent

[1] Some critics of Williamson (such as Kay and Dow) have failed to give Williamson the benefit of the doubt in this regard, arguing that Williamson's concept of a transaction as the differentiated 'unit of account' of governance structures is too 'elastic'. Neil Kay 'Markets and false hierarchies: some problems in transaction cost economics' European University Institute Working Paper No.87/282 (1987), 13-18; Gregory K.Dow 'The function of authority in transaction cost economics' Journal of Economic Behaviour and Organisation, 8 (1987), 15. To some extent, of course, Williamson's use of the concept offers an easy target for critics, and he has latterly admitted that the identification of a 'transaction' as a unit of analysis is a mere heuristic and is not to be pressed too far. See Michael H.Riordan and Oliver E. Williamson 'Asset Specificity and Economic Organisation' International Journal of Industrial Organisation, 3 (1985), 365-78.

[2] Oliver E. Williamson 'The modern corporation: origins, evolution and attributes' Journal of Economic Literature, 19 (1981), 1564.

[3] Oliver E. Williamson 'Transaction Cost Economics: The Governance of Contractual Relations', 245 ff.

earnings are minimised [1]. Institutions like firms are thus able to economise upon transaction costs principally because of their ability to reduce informational asymmetries which give rise to opportunistic behaviour (that is 'cheating') by individuals. Internal regulation, the monitoring of 'opportunism', and the assertion of authority reduce the ex post costs of transaction.

This so-called 'new industrial economics' of transaction costs is, of course, dependent upon the development of the purely comparative method common to all forms of what has been labelled the 'new institutional economics' (or NIE); and it is precisely these ex post costs which are most demanding of a comparative analysis, as both economists and historians making use of the Williamsonian framework agree [2]. Internal organisation and not external circumstance determines the efficiency of institutional arrangments with respect to individual transactions. Consequently, the economic scientist is invited to compare institutions with alternative (and hypothetical) governance arrangements with respect to single transactions

[1] Benjamin Klein, Robert Crawford and Armen Alchian 'Vertical integration, appropriable rents and the competitive contracting process' Journal of Law and Economics, 21 (1978), 297-326; David Teece 'Toward an economic theory of the multiproduct firm' Journal of Economic Behaviour and Organisation, 3 (1982), 39-63; Kirk Monteverde and David Teece 'Appropriable rents and quasi-vertical integration' Journal of Law and Economics, 25 (1982), 321-328 develop this theme.

[2] On which, Langlois 'Internal organisation in a dynamic context', 30-33, where differences in 'imperfect structural knowledge' (33) are said to indicate varying degrees of organisational efficiency, and Douglass North 'Comment on Stigler and Friedland 'The Literature of Economics: The Case of Berle and Means'' Journal of Law and Economics. 26 (1983), 269.

in order to assess the performance of existing structures. Because of the primacy of the ex post costs of monitoring, enforcing and policing contractual arrangements resulting from (institutionalised) bargaining, the comparative method usually resolves itself into the relatively simple issue of identifying internally consistant rules for the minimisation of opportunism within the institution [1]. The question which naturally imposes itself upon the mind of the discerning economic scientist is exactly what evidence constitutes proof of the existence of internally consistent rules of this type ? More significantly, what evidence is there that non-ideological factors alone influence the performance of governance structures [2] ? The main problem experienced by most economists and historians in their use of the Williamsonian comparative method of NIE is the relative difficulty in defining standards of comparison and objective measures of the 'transaction cost minimising' performance of governance structures. As such it must be accounted a relatively unsophisticated and unworkable form of historical economic analysis - although apparently the most frequently mobilised in empirical studies of the modern economy - and will be abandoned without further discussion. Comparable but superior forms of comparative analysis are nevertheless available which use much of the descriptive and analytical 'baggage' of both neoclassical and NIE theories of PRTC, the most flexible of which (the neoinstitutionalist) provides the basic structure for the formal model of transaction costs

[1] Discussed in Romano Dyerson 'Technical change implications for economic organisation in the CADCAM sector: a suggested transaction cost approach', circulated TS, Department of Economics, Heriot-Watt University, May 1987, 24. My thanks to Romano for furnishing me with some unnoticed references to comparative NIE studies using such a method.

[2] North Structure and Change, 204-205.

developed in the rest of this essay through the study of historically relevant governance structures and their performance.

The neoinstitutionalist critique of PRTC theory is largely the result of the articulation of a post-institutionalist response to the economic theory of property rights developed by the Chivirla economists during the 1960s and 1970s. As such it is a natural part of the complete critique of neoclassical, or orthodox, theory and in particular of NIE made by the so-called neoinstitutionalist economists - often called 'heterodox' economists or writers of the 'economics of dissent'[1]. The neoinstitutionalist economists of today claim for themselves an intellectual ancestry which includes, in the present century, Commons, Veblen and Clark among economists and Tawney, G.D.H.Cole and Polanyi among historians and other social scientists [2]. While earlier economists and students of economic phenomena who dissented from the pervasive neoclassical theory of atomistic market behaviour certainly attempted to direct their historical studies of labour organisation (Commons), religion and moral forces (Tawney and Veblen) and industrial society (Mitchell, Cole, Nutter, Veblen, Galbraith and others) toward the critique of received theory as doctrine, their scholarship was intended to offer a commentary upon the current state of economic theory rather than specifically developing more relevant or

[1] See Allan G.Gruchy Contemporary Economic Thought:The Contribution of Neo-Institutional Economics (London,1973), Chp.1; idem. 'Neoinstitutionalism and the Economics of Dissent' Journal of Economic Issues, 3 (1969), 3-17; Warren J.Samuels (ed.) The Methodology of Economic Thought (New Brunswick and London, 1980) on the nature of neoinstitutionalism.

[2] Gruchy Contemporary Economic Thought, 1.

workable theory. It was specifically not intended to be the starting point for a theory of the 'post-industrial' polity and the forces that shaped it.

Neoinstitutionalist economists appear to have argued, from the 1960s, that the economics of the market economy in the 'post-industrial' age of 'consumerism', collective choice and rational planning demanded that institutionalist economic analysis translate the critique of neoclassical theory it had offered over the previous half century into a holistic theory of that 'post-industrial' economic system in which they suppose we now live [1].

Yet the mainstay of the neoinstitutionalist response to neoclassical theory remains to this day the challenge to the marginalist theory of rational economic behaviour. From observation, empirical historical deduction and from anthropological induction neoinstitutionalist economists have subjected the received orthodoxy of neoclassical theory about the choice theoretic basis of the economic system to severe analysis. Consequently the development of a broader and market oriented theory of property rights such as that developed by the Chivirla economists in the 1970's naturally prompted neoinstitutionalist comment upon both the economic implications of the theory and the philosophical and logical basis of the theory. Here we can only deal briefly with the complex and often fragmentary critique of PRTC theory offered by these economists, nevertheless we shall see that their arguments are largely directed toward

[1] H.H.Liebhafsky 'Allan Gruchy, Neoinstitutionalist' in John Adams (ed.) Institutional economics: Contributions to the Development of Holistic Economics - Essays in Honor of Allan G.Gruchy (Boston, The Hague and London, 1980), 21-22.

the micro-foundations of the PRTC theory and not to its principal assumption that the costless enforcement and policing of property rights most effectively maximises welfare. Indeed, neoinstitutional economics makes much of the value of freer markets and trade in the analysis of technological change, the socio-economic consequences of combination and concentration of market and indirect (non-market) power and in social change. Yet for the neoinstitutionalist economists, it is not enough that market mechanisms perform optimally for the economy is but a subset, and in fact a very small part, of a wider and more complex dynamic social system.

Drawing principally upon the theoretical basis of the Chivirla approach for their critique - namely the Coase theorem - the neoinstitutionalist economists argue [1] that the PRTC approach advances a decidedly normative policy prescription for welfare optimisation and efficient economic

[1] The following argument is based upon a number of disparate and almost contradictory statements about the function of the Coase theorem in welfare theory and the PRTC paradigm made by neoinstitutionalist critics in the 1970's and results from a reading of the following papers: Allan Gruchy 'Neoinstitutionalism and the Economics of Dissent...', 14-17; H.H.Liebhafsky 'Price Theory as Jurisprudence - Law and Economics Chicago-style' Journal of Economic Issues, 10 (1976), 23-43; idem.'The Problem of Social Cost - An Alternative Approach' Natural Resources Journal, 13 (1973), 615-676; Allan Randall 'Coasian Externality Theory in a Policy Context' Natural Resources Journal, 14 (1974), 35-54; idem. 'Market Solutions to Externality Problems: Theory and Practice' American Journal of Agricultural Economics, 54 (1971), 175-183; idem. 'Property Rights and Social Microeconomics' Natural Resources Journal, 15 (1975), 729-47 ; idem. 'Property Institutions and Economic Behaviour' Journal of Economic Issues, 12 (1978), 1-21; Warren J.Samuels 'Introduction: The Chicago School of Political Economy' Journal of Law and Economics, 14 (1971), 435-50; idem. 'The Coase Theorem and the Study of Law and Economics' Natural Resources Journal, 14 (1974), 1-33. This critical literature on the Coasian basis of PRTC theory has now largely vanished, although recent work by Alexander Field (from a very different - neoclassical - perpective) has embellished and developed a fuller critique of Chivirla PRTC theory based upon similar observations.See Field 'Microeconomics, Norms and Rationality' Economic Development and Cultural Change, 32 (1984), 683-711.

organisation, and they hold these beliefs to be the cornerstone of the Chivirla approach rather that its supposed positive theoretical grounding in Paretian welfare theory. They argue that the PRTC approach advocated by Chivirla economists, unlike the Pigouvian welfare theory it claims to replace, regards the distribution of initial endowments and subsequent bargaining over them as less important than the market process by which Pareto optimality is achieved with fixed endowments. In support of this, some neoinstitutionalists offer an explanation of how initial property rights arise and are distributed in terms of political, military and other social forms of coercion through power relations on the one hand and through the evolution of contractual forms, general rights and other forms of legal restriction within given 'constitutional frameworks' on the other.

The argument against the restrictive assumptions of the Coase theorem is, however, far less significant for neoinstitutionalist economists than the analytically narrow focus of the resulting theory of institutions. Institutionalist economists, like their intellectual forerunner John Commons, view property rights not as the outcome of the degree of market perfection but as the consequence of deliberate collective action or through the artificial selection of efficient public, human, rights [1]. So transaction costs actually represent '...the protection of interests through rights as they become valued through the market, which is the case with all other costs' [2]. In other words, transaction cost payments act as the 'guarantors' of private but collective rights which cannot be

[1] Randall 'Property Institutions and Economic Behaviour', 4.

[2] Warren J. Samuels 'The Coase Theorem and the Study of Law and Economics', 19.

alienated by the market. Indeed the collapse or disappearance of aggregate transaction costs would actually reduce the real welfare benefit of private citizens in some cases where the 'constitutional framework' of their rights was impaired by market action. Institutions are the physical or - in the form of rules or laws - the metaphysical embodiment of those collective rights. Consequently efficient institutional arrangements will ensure that the collective benefits of the maintenance of collective rights, together with the capacity of institutions to reduce market failure like external effects, exceed the (transaction) costs associated with the operation of the institution [1]. Conversely, the institutional arrangements which may be made to reduce transaction costs may reduce the gap between the (social) costs and benefits in the reduction of a technological externality without encountering the market itself. For neoinstitutionalist theorists there are in fact multiple possible levels of externality-reducing internalisation technology associated with different sets of private rights, through for example improvements in the operation of institutional rules divorced from considerations of opportunity cost or the attainment of the optimal utilisation of capital through gains in institutional 'x-efficiency' [2].

[1] H.H.Liebhafsky 'The Problem of Social Cost', 629-76.

[2] Randall 'Property institutions and economic behaviour',10-11; Samuels 'The Coase Theorem and the study of law and economics', 19-25 ; Randall 'Market Solutions to Externality Problems...', 179-80. X-inefficiency, although regarded by some as a part of transaction cost, relates to that part of welfare loss not attributed to the allocative function and institutions of the market. On x-efficiency, see Harvey Leibenstein Beyond Economic Man: A New Foundation for Microeconomics (2nd edn., Cambridge, Mass.,1980), Chp. 3. On the parallels between X-efficiency theory and the PRTC approach to allocative efficiency, see Louis De Allesi, 'Property rights, transaction costs and x-efficiency', and particularly, Kurt Reding and Ernst Dogs 'Die theorie der 'X-Effizienz' - ein neues Paradigma der Wirtschaftswissenschaften ?' Jahrbuch fur Sozialwissenschaft, Bd. 37,(1986), 10-39, the most thorough treatment of x-efficiency theory in terms of a general model of economic development.

Instead, neoinstitutionalists point to those alternative economising activities of institutions and organisations designed to reduce external effects such as risk reduction, intra-institution reductions in the specification errors associated with property rights assignment and non-market economies emerging from changing patterns of trade. Although some Chivirla economists and followers have made much of the existence of such additional considerations in organisational development, they have regarded risk of any kind as being essentially 'traded-off' against reduced transaction costs [1]; neoinstitutionalists, on the other hand, regard risk reduction in contractual organisation as essentially uninfluenced by transaction costs considerations. Contractors (for example, firms and workers) care more about ensuring that their present contracts cover tomorrow's anticipated eventuality than in ensuring that the costs of specifying and policing tomorrow's contracts are reduced through efficient property rights assignment.

Of undeniably greater significance, but of a less controversial nature in the light of our earlier discussion, is the neoinstitutionalists identification of the problem we earlier labelled 'divisibility'. The existence of perfectly divisible transaction resources is as unlikely, they argue, as the attainment of an economy of zero transaction costs [2]. What this means is best understood in terms of an example. Suppose two agents seek to improve their total and individual welfare to a position of Pareto

[1] Notably Steven N.S.Cheung 'Transaction Costs, Risk Aversion and the Choice of Contractual Arrangements ' Journal of Law and Economics 12, (1969), 23-42.

[2] Randall 'Property Institutions...', 10; John Weld 'Coase, Social Cost and Stability' Natural Resources Journal 13, (1973), 599.

optimality by engaging in the assignment of property rights in external effects through the process of wholly or partly internalising the external effect which is Pareto relevant. Neoinstitutionalist economists would argue that both agents may actually be made worse off beyond a certain point in the introduction of the transaction technology - for example, Pareto optimality might be attained where a supervisory mechanism detected one in ten infringements. If the only available transactions technology detects ten out of ten infringements, any additional cost resulting from the technically superior technology will increase the social costs of installation without correspondingly increasing the social benefits. This can be a very real problem where specification and policing technologies are employed: often in fact the transactions technology cannot be manufactured or utilised in such a way as to exactly match the efficiency requirements of agents and thereby secondary external effects are created which in turn require internalisation or some other form of reduction.

This problem of divisibility in transactions technology is most clearly seen in relation to legal technologies for the regulation of conduct such as 'liability rules' (rules for the forfeiting of some compensatory sum to reestablish optimal allocation). Those who criticise the work of that branch of legal economics most commonly associated with PRTC, the 'law-and-economics' genre or 'Posnerian law-and-economics', have pointed to the very real problems caused by the indivisibility of liability rule technologies in exchange and property rights regulation. Guido Calabresi for one, whose own earlier work embraced much of the neoclassical theory which supports Chivirla PRTC economics, argues that lawyer-economists who ignore the

divisibility issue become habitually trapped by what he has called the 'fanatical Pareto test' [1] by which efficient assignments rather than effective, law-enforcing, assignments through a liability rule technology are adopted. Judges simply are not able to break the characteristic indivisibility of the transactions technology infallibly and inevitably. This becomes a particular problem within PRTC methodology of the Chivirla variety where liability rules as institutions are said to be a priori rational and optimal in their result but where the indivisibility of liability rules results from incomplete knowledge on the part of a judge. In the words of one incisive critic

> Generally speaking the only occasions on which the common law went wrong (it seems) was in the (rare) adoption of paternalistic rules which restricted freedom of contract, for example the rules against penalties. The monotonous regularity with which judges untrained in economics have come up with solutions which are thus said to be economically optimal has, not surprisingly , come in for a good deal of scepticism, not to say derision [2].

It must not be thought that the existence of indivisibilities in transactions technology are observed solely by neoinstitutionalist economists - indeed earlier in this chapter we noted the existence of the divisibility issue without following the same apparatus of theory utilised by neoinstitutionalist economists. However the very importance of this issue to the neoinstitutionalist case cannot be underestimated, for it indicates that the nature of an institution may and frequently does determine the efficiency of property rights assignments through the distributive, exchange, mechanism.

[1] Guido Calabresi 'The New Economic Analysis of Law' Proceedings of the British Academy, 68, (1982), 85-108.

[2] P.S. Atiyah 'Executory contracts, Expectation Damages and the Economic Analysis of Contract' in Essays on Contract (Oxford,1986), 151.

For neoinstitutionalist critics indeed the economic analysis of the assignment of property rights and associated transaction costs can be expressed as a problem of understanding institutional arrangements themselves before analysing their relative efficiency in the economy. Institutions are the starting point for the analysis of economic efficiency. Neoinstitutionalists argue that the multiplicity of assumptions made by the Coasian PRTC method reduces its usefulness [1] and, moreover, that the types of institutional structures analysed by the method are unreal. For the neoinstitutionalist economist institutions are the embodiment of existing rights and power and consequently are liable to influence the outcome of using transactions technologies in the attainment of Pareto optimal allocations in successive time periods. As such, they are the very elementary forms to be studied in any PRTC analysis of economic efficiency. Instead of explaining what forms of economic orgnaisation ought to emerge, neoinstitutionalists seek to explain why existing forms persist. Equally, and contrary to the form of comparative analysis promoted by Williamson-type approaches to empirical transaction cost problems, neoinstitutionalist method starts by identifying the obstacles to transaction cost economising activity due to existing power or ownership structures.

This and the previous chapters has dealt in some considerable detail with the economic theory considerations behind the use of the PRTC theory common

[1] Warren J.Samuels 'The Coase Theorem', 25-6 and the sources cited therein.

to all economists making use of the elementary concepts of transaction cost. The purpose of these chapters has been at once to introduce economic historians for the first time to the diversity of alternative theories and to point to some of the contradictions in individual formulations of PRTC theory.

In the rest of this study explicit use is made of a general theory of property rights which draws for its language and basic characteristics upon the Paretian and Coasian formulation common to Chivirla, Williamsonian and neoinstitutionalist theories alike. That is to say, it will be accepted that transaction costs (contrary to some neoclassical and neo-Walrasian formulations) are continuous with production; that the efficiency with which institutions assign property rights is determined by the level of transaction costs; and that transaction-cost economising considerations eventuate institutional change. Consequently instead of arguing that institutional change results from the inherent logic of profit maximisation we shall maintain throughout that profit considerations play little part in the evolution of institutional form and that competitive forces have little role in the development of elementary institutions of the type found in later Georgian rural England. However we shall not accept the Coasian argument, enshrined in Chivirla PRTC economics, that the utility function should remain at the centre of analysis in PRTC theory. As indicated above, there are reasons to doubt the logical basis for this claim (the trenchant criticisms of the Coase theorem itself give these doubts substance), notably that the 'institutional constraints' upon the individual utility function are too confused or nebulous to be identified in contemporary let

alone in historical economies. Consequently, we shall pay little to the (counterfactual) evidence of the ex post augmentation of agents' welfare following any institutional change. Instead, we shall concentrate upon the 'logic' of organisational change itself.

In general, the neoinstitutionalist method of analysis - which starts with institutions rather than agents - will be preferred throughout and effort will be made to explain institutional change in the context of wider economic and social change. Further, and in common with both Williamsonian and neoinstitutionalist formulations of PRTC theory, the issue of the divisibility of transactions technology and the existence of opportunism in non-internalised governance structures resulting from informational asymmetries (usually in the form of private rights to policing and surveillance) will be fully explored. We shall also make use of the (Williamsonian) observation that the appropriation of rents by institutional structures further reduces transaction cost. The pattern of institutional change, in our account, will depend upon agreement with the assumption shared by all Paretian 'clone' theories that efficiency in rights assignment more nearly approaches Pareto optimality where transaction costs are minimal. Consequently, we shall maintain that new institutional structures result from attempts to minimise transaction costs. However, unlike conventional Chivirla-type accounts, and in common with neoinstitutionalist PRTC theory, we shall be careful to avoid the suggestion that institutions only undergo change in governance structures as a result of transaction cost considerations.

Parts II to IV of this essay contain a detailed but by no means complete account of the role of transaction cost considerations in the development of economic organisation in later Georgian rural southern England. This makes some use of the framework of analysis offered above. Some aspects of the process by which institutional change in provincial England came about will be ignored – notably enclosure and the creation of larger farms, which has already been dealt with elsewhere using PRTC analysis [1]. Indeed, not even all aspects of the process by which supervision, control and enforcement of transactions developed will be examined here; this essay is, after all, an exercise in an historical economic theme and not a complete history of rural economic institutions. Attention will, however, be paid to the evolution of informal organisations (such as voluntaristic agencies and clubs) whose development is subject to forces unconnected in the main with the problem of minimising transaction cost. The general argument will be that, in the course of the late eighteenth and early nineteenth century, rural southern England experienced a virtual revolution in institutional organization – a revolution which it sis suggested, can be attributed (although there can be no conclusive proof) to an attempt to reduce transaction costs. The specification of private rights in all forms of monitoring and exchange created, it will be argued, entirely new structures of governance. The consequences for the efficiency of the economy of the rural south are debatable but it will be maintained that the mixed fortunes of these new forms of governance belies the existence of a pattern of institutional change in the provinces conformable to the principles of PRTC theory outlined here.

[1] Carl J.Dahlman The Open Field System and Beyond (Cambridge, 1980).

In general we shall study historically sifnificant institutional change with the help of PRTC theory using historical records and try to avoid writing what Basu, Jones and Schlict have quite properly labelled 'theorist's history' [2]. However, the often inscrutable materials available do not allow the historian precisely and conclusively to establish the relationship between transaction cost reduction and institutional change and much that might appear in these pages as conclusive assertion must be read as plausible hypothesis based upon theory. Specifically, the reader must guard against supposing that the imputation of motives of transaction cost reduction can be categorically demonstrated - instead they are here preferred as an appropriate and consistant explanation. With the materials available to the historian of the period, however, it is difficult to see how this could be otherwise. Thus, for example, we shall not seek slavishly to quantify the unquantifiable. It has been a persistent complaint of non-practitioners that PRTC historiography is in the main non-quantitative [2], but such critics

[1] Kaushik Basu, Eric Jones and Ekkehart Schlict 'The Growth and Decay of Custom : The Role of the New Institutional Economics in Economic History' Explorations in Economic History 24, 1987:15.

[2] Critics of PRTC theory who complain of the non-quantitative nature of PRTC historiography include, D.C. Coleman loc. cit; S.R.H. Jones 'Technology, Transaction Costs and the Transition to Factory Production in the British Silk Industry, 1700-1870' Journal of Economic History 47, 1987: 74; Lance E.Davis 'Comment' in Stanley L. Engerman and Robert E. Gallman op. cit :149-159. However, measurement methods vary from one PRTC study to another. There have been quantitative studies unashamedly utilising a Coasian approach (e.g. Lee Alston Costs of Contracting and the Decline of Tenancy in the South. 1930-1960 (New York and London, 1985)), neoclassical partial equilibrium method (e.g. Elizabeth Hoffman and Joel Mokyr 'Peasants, Potatoes and Poverty : Transaction Costs in Pre-famine Ireland' Center for Mathematical Studies in Economics and Management Science, Northwestern university, discussion paper 474 (1981)) and the simple fudge of 'counting instances' (e.g. North and Wallis op. cit). The most commonly affirmed framework for the quantitative analysis of transaction costs in economic history requires adopting a cost-benefit framework for the analysis of institutional efficiency.

fail to recognize that the relative size of the transactions sector is less important than the explanation of the process by which institutional structures which incorporate transaction cost elements arise. PRTC economic history is an attempt to explain how institutional change occurred and does not depend upon the existence of quantitative data for success.

Nevertheless, it is important to remember exactly how far demonstrative proof of the assertions made above [1] and elaborated in the following chapters can be guaranteed. Whilst evidence of the reduced costs of exchange can be inferred (if rarely accurately estimated), it will be readily admitted that the causal relationship between institutional change and transaction cost reduction - and indeed the exact degree of reduction in such costs associated with changing patterns of organization - cannot be indisputably proved. Instead we shall suggest that organizational change tended in the direction of reduced costs of transaction. This is all that can, or ought, to be asserted until a more comprehensive and definitive methodology of transaction costs analysis allows the historian to add measurement to conjecture and precise correlation to inference. Throughout what follows, then, the reader must presume conclusive proof of motivation is elusive and suggestive inference is preferred.

With a clearer understanding of the functions and limitations of transactions cost economics, we are in a position to begin the analysis of the organisational changes which occurred in the rural south during the late eighteenth and early nineteenth centuries.

[1] See supra p. 98.

CHAPTER FOUR: THE LEGAL HISTORY OF MARKET INSTITUTIONS, 1780-1840

> 'The history of western Europe from the fifteenth to the nineteenth centuries has often been misread because of a failure to grasp the distinction between the Self-Regulating Market System and a number of markets more or less free to regulate themselves, but in sum not constituting a Self-Regulating System' [Walter C. Neale, 1957]

Having studied the logical and theoretical foundations of the PRTC theory it is now our task to put it to work in the analysis of change in the institutions of the market economy of provincial southern England during the later Georgian and Regency eras. Following much recent work to be discussed below it has become apparent that during these years something approaching an organisational revolution occurred in the market economy by which property rights in the means of exchange were transferred to new owners and transaction costs reduced. We shall argue that private rights came to be specified in transactions technologies rather than in new products or devices for the production of new forms of commodity. In general, the argument of this essay will be that these years were marked by a reformulation of the principles of property rights allocation, transfer and definition in a way which allows us to discern a distinct discontinuity with the past; we shall assert that these apparently previously unconnected elements of the legal-economic order constitute, when taken together and seen as part of a process of reform of the basis of property ownership and transfer, a revolution in the organisation of the means of exchange. In this and subsequent parts of this essay, the exact nature of this organisational revolution will be explored and the most vital featues of it - namely the creation of separable rights in transaction, supervision and

enforcement with accompanying instruments suggesting the reduction of transaction costs - will be examined through the study of a variety of sources. Frequent (but not slavish) reference will be made throughout to the conceptual scheme which was elaborated above and institutional and organizational metamorphosis described in the language of the hybrid PRTC theory developed in the latter sections of the previous chapter. Our guiding rule in chief will be to observe institutional change directly and to impute rational transaction cost reducing actions to agents without explicitly stating the welfare outcomes for individual utility maximizers. Central to the whole conception of an 'organizational revolution' during this period, however, is the fundamental change in the character of the market as the basic institution of the economy. It is with these changes in the function and ownership of the market institutions of the provincial south that we begin.

Economists regard markets as chimerical institutions made up of buyers and sellers whose interest in the organization of exchange is minimal. This perception assumes that our interest is only in the rational outcome of exchange and bargaining expressed in terms of price. It assumes further that the market is 'ownerless' but is populated by economically powerful but politically powerless traders whose only opportunity to influence market behaviour is through buying and selling and not through direct control or regulation of the market itself. The Coasian version of the transaction cost theory outlined earlier starts from the important observation that, even when expressed in terms of the costs of producing market information, this image of the market-place is unrealistic. For historical economists

also the institution of the market performs the function of making repetitive exchange possible at low cost; markets are in fact economizing institutional arrangements which act to increase the welfare efficiency of transactions for the 'price' of access to their facilities. This feature of the Coasian (and 'clone') PRTC analysis of elementary, non-hierarchical structures has important implications for the historical economist, for the very fact that the use of the market is not freely and costlessly available implies that property rights in market institutions do exist. In part at least this and the following chapter are a vindication of the correctness of this view - for eighteenth and nineteenth century markets were indeed 'owned' by private individuals and collectives. Further, as this chapter and the following one shows, these property rights in markets appear to exercise a considerable influence upon the performance of the institutions of market exchange and consequently upon the economy as a whole. This chapter hypothesises that, by both legal and organizational means, property rights in markets underwent a significant transformation in the course of the late eighteenth and early nineteenth centuries with the probable effect of reduced market transaction costs and increasing market efficiency. Whilst legal change was slow and occasionally acted in a manner which contradicted this tendency, the pattern of change in market rights confirms this historical account of the development of the nineteenth century market; and where law failed, institutional adaptation by market traders themselves succeeded.

Two processes were principally responsible for the evolution of

alternative forms of market institution. Firstly, by transferring some of the transaction costs of market exchange to 'sub-contracting' leaseholders, prescription holders or buyers, owners created new forms of hierarchical arrangements with alternative governance structures. The creation of these intermediate institutions maintaining the communal property rights of new owners may in turn have reduced the transaction costs associated with market exchange for owners because of their greater organisational efficiency. The second process by which property rights in the market underwent significant change was through a subtle legal revolution. With the creation of a novel law of prescriptive rights (that is, law relating to the rights to the use of an asset as a result of immemorial custom), the courts effectively made previously worthless assets in market property saleable and tradeable, facilitating the transfer of much of the organization of market exchange to new owners. In order to appreciate the complex nature and consequences of the historical evolution of property rights in markets during the late eighteenth century and the early nineteenth century, it is necessary to study both the legal and organisational aspects of this economic revolution. Before undertaking a detailed study of the behaviour of markets and their owners in the late eighteenth and early nineteenth centuries, it is essential to understand the legal context in which property rights transfer was effected and organisational change occurred.

The evidence of the legal granting of market rights had always been relatively simple to produce, for statute law alone could create rights in the market property intended for trade. During the late eighteenth and early nineteenth century, however, the common law of markets, which was principally concerned with the obligations of the users of the market as

well as those of the owner, witnessed a not insubstantial battle between proprietors and users (both traders and consumers) over the exact nature of the rights of market owners, the prescription of tolls for market use and the requirements that owners provide adequate facilities. We shall suggest that, in practice, these problems were all associated with the need to reduce market transaction costs and that new organizational arrangements as well as legal change seems to have facilitated their reduction. The study of the legal history of the property rights in markets during the period does allow the investigation of the practical aspects of the process by which aggregate transaction costs may have been reduced, not only because the legal framework provides the background against which organizational change in rural marketing occurred, but also because organizational change in market institutions frequently appears to have been running ahead of change in the common law of markets from which one might infer that institutional change in market property rights and associated transaction costs may have orchestrated and promoted legal change. Indeed, so successful was the organisational reform of the market rights ownership without the law that legal decisions tended to concentrate not upon the determination of ownership itself but upon the limitation of obligations and duties.

'Use' rather than 'ownership' and the obligations of owners rather than the duties of traders crowd the pages of learned judgments during this period, for the assignment of property rights in markets was no longer an issue in the English common law courts. The right to grant markets had rested with the crown since the Statute of Westminster [1], but it was only

[1] Joseph Chitty A Treatise on the Law of the Prerogatives of the Crown; and the relative duties of the subject (London,1820), 193.

during the late eighteenth century that the predictable contest between owners and users moved beyond the point of merely defining the status of rights in markets given by the monarch [1]. The obligation of owners to offer those making use of market facilities 'convenient accommodation' was only finally established by a judgment in the House of Lords in 1835 [2] whilst the common law restraint upon owners, under the terms of the franchise of a market, not to confiscate goods in distress for payment during the period of trading had been decided over a century earlier [3].

Between the two decisions, a discernible pattern of legal reform emerged in which the rights of traders and market users came to represent the most important element of the law of markets. Before the period with which this essay is concerned began, the major concern of law in relation to markets was to establish limitations upon the charter and statute rights of owners; during the late eighteenth and early nineteenth centuries the obligations of owners toward traders and other users came to be recognized as being in need of significant reform in the courts.

[1] See J. G. Pease and Herbert Chitty A Treatise on the Law of Markets and Fairs with the Principal Statutes Relating Thereto (London,1899); F.S. MacGatchen The Law of Fairs and Markets (London,1859);William Marriot The Country Gentleman's Lawyer; and the Farmer's Complete Law Library (London,1808). These texts have been used to trace the main lines of development of the law relating to markets; however, several significant errors in each have needed to be corrected in this essay by the careful analysis of contemporary case law itself.

[2] In re Islington Market Bill (1835) 6 ER 1530-34; Lords Journal 41,(1835), 285, 583-4. The significant words 'convenient accomodation' were uttered by Littledale, L.J. at 1532 of Islington Market Bill.

[3] Wigley v. Peachy,Keddon and others (1732) 99 ER 527-29. See also Sawyer v. Wilkinson (1598) 78 ER 868-69 and Austin v. Whittred (1746) 125 ER 1353-55 for restraint upon distress confiscation at the end of the market.

Indeed when the issue of the limitation of ownership rights appeared at all in the courts of common law after the mid-eighteenth century it was only discussed in relation to the effect of custom and usage upon planned expansions of markets or removals to other sites - and here the important decisions of the courts were almost wholly in favour of existing owners. When owners failed to provide adequate accommodation for traders and farmers, the latter could not defy the owner of the market by removing to another site [1]; equally when owners removed their market to another site, buyers and sellers had but a limited right to resort to the old market site [2]. Of central importance to these few cases concerning the rights of owners was the law relating to the evidence of custom; yet only in relation to the obligations and duties following ownership did the law adopt the evidence of custom in preference to the test of efficiency. Custom and ancient rights might be assumed by a jury to remain unchallenged even where no title deed or bill of sale was available to indicate clearly and indisputably who owned the market rights [3], and by 1802 [4], a term of 20 years had been fixed as evidence of 'immemorial existence'.

[1] Curwen v. Salkeld (1803) 102 ER 703-6. Later owners were required to give notice of the demise of an old market site before reestablishing the market at a new location, Prince v. Lewis (1825) 172 ER 30-32.

[2] Prince v. Lewis. Before Prince it appears that corporate owners sought to limit resort to the old sites by means of byelaws alone. In Hertford in 1781, for example, the Common Council promulgated an 'Act' (or order of council) '...to prevent the continuance and use of the said Market Place for the sale of Butchers Meat...' after using the site for the building of the new Town Hall. Orders of Common Council, Borough of Hertford MSS. Volume 36, Herts. R.O., entry for 26 September 1781. Cf. A. Temple Patterson Radical Leicester: A History of Leicester, 1780-1850 (Leicester, 1954), 4-5.

[3] Mayor of Hull v. Horner (1774) 98 ER 989-94.

[4] Rex v. Smith (1802) 170 ER 659-60.

This support for, even redefinition of, custom was, however, quite contrary to the general tendency of law. For whilst the practice of law and the changing nature of legal argument concerning prescriptive, market, rights cannot indicate the chronological development of institutional change in response to the pressures of transaction cost with the certainty and precision required the law courts were the stage for the reaction of rural traders to the long lasting and basically feudal privileges of ownership only during these years. The coincidence of market expansion in the early years of the nineteenth century with a catalogue of cases reversing, attenuating or reinterpreting those ancient privileges suggests that resort to law was, in fact, becoming less effective as a means of challenging the institution of market property. By then, organisational adaptation had taken a firm hold in rural market society and legal innovation proved less successful. It was in the courts that the opposition of the trading community to outdated and illiberal trading practices took root, however, and it is to judgments at common law that we must look to trace the history of market property rights in this period.

First, it is necessary to outline the relationship between traders and owners as it was understood by the law throughout the late eighteenth century. Only with the codification of a standard definition of the nature of a market in the case of Rex v. Marsden in 1765 [1] was a distinctive meaning given to the assorted rights associated with the grant of a market. This important case established that market rights, like contractual obligations, could only be proved with the evidence of some payment or

[1] 96 ER 335-336.

'consideration' for the use of the market, and in the case of eighteenth and nineteenth century markets this implied that the taking of tolls on market day was the sole evidential test of the existence of market property rights. Whilst earlier cases and even statute law had established the rules governing toll prescription (the right to collect toll without hind rance) [1] little attempt had been made before Rex v. Marsden to relate the collection of the toll to the property rights in the market, either as a rule of evidence or as part of the law of the market. Certainly the common law of contract suggested by the 1760's that toll prescription implied ownership unless tolls were leased. Yet earlier attempts to find a resolution of the problem of identifying conditions for ownership had effectively separated the ownership of facilities and the ownership of access tolls and whilst only Gavelkind law maintained the rule that market rights and piccage and stallage rights decended separately - and were transfered separately - common law before 1765 held that the one was not sufficient proof of the other [2]. The proof of ownership lay not in the power to affect users but in the continuation of the market after custom [3].

In Rex v. Marsden, Lord Justice Mansfield made it clear that behind his

[1] Especially through 22 Car.II c.8 and Mayor of Northampton v. Ward (1746) 93 ER 1155.

[2] Thomas Robinson The Common Law of Kent: or, The Customs of Gavelkind (London,1741), 79. See also Customs and Privileges of the Manor of Stepney and Hackney in the County of Middlesex (London,1736) [copy in Goldsmiths Library, University of London].

[3] [Anon.] Points in Law and Equity,Selected for the Information, Caution and Direction of all persons concerned in Trade and Commerce (London, 1791), 144-5; Giles Jacob A New Law Dictionary (London,1772), qv. 'Market'.

judgment lay the important and novel assumption that without evidence of the taking of toll or the operation of a regulatory court of the market, there could be no usurpation of a market, for there could be no market in existence. Ownership depended upon the 'exercise of use' and, in particular, upon the regulation of tolls and fines; power of this kind actually constituted ownership. In Mansfield's own words 'There are no marks of a market or fair, no toll taken...' [1], yet regulatory power, too, represented evidence of ownership and should similarly be taken to be valid for a claim of the ownership of a market. Two important consequences followed from this interpretation of the common law of market ownership: first, that ownership and prescription of toll were regarded as being synonymous with regulatory power and, secondly, that ownership still carried with it an implied right to the fruits of trade during the continuation of the market. Both of these consequences proved to have an effect upon the development of the rural market in the course of the following century. A digression will illustrate why this was the case.

The regulation of markets and fairs was exercised through local courts whose specific function was to deal with abuses of market customs. The Courts of Pie Poudre, of the Clerk of the Market and Court Leet of the Manor all acted as regulating jurisdictions for their markets. Yet in the course of the late eighteenth and early nineteenth centuries many of these local courts declined in importance or were, at local level, superseded or abolished and similarly the posts of their officers came to be consolidated with those of other town officials. Frequently corporations took over these

[1] Cited in J.G. Pease and Herbert Chitty Treatise on the Law of Markets.

market courts with newly transferred property rights in the market. In Cambridge, for example, the pie poudre court of Stourbridge Fair met only three times between 1768 and 1823 [1], its functions having been transferred to the Mayor's court and in Lewes in Sussex the town's committee for establishing a new market suggested in 1790:

> 1. That the Lords of the said Manor [who owned the market rights] shall continue to exercise their ancient Right of appointing a Clerk of the said Market who shall receive the annual Sum of Pounds...[and]
> 2. That the Commissioners [of the new market] shall have a power appointing an Officer to collect and receive the Tolls of the said market [2].

The new, private, commissioners of the market plainly had little need to control the regulatory post but required the power of appointment to the toll collector's post. This common division of responsibilities reflects the contemporary realisation that the old court posts and functions were now largely irrelevent to contemporary market conditions; with the growth of local, corporate government in the course of the eighteenth century and the decline of older forms of property rights, the transfer of these and other duties to the councils and the shires brought many courts of market

[1] Record Book of the Court of Pie-poudre, Cambridge, 1760-1823, Cambs. R.O. Cambridge Corporation MSS. Box II/5. The only other surviving records of the courts of pie-poudre located are for Rye (Suffolk R.O. (I) Eye Borough MSS. K/5/21); these fail to indicate how regular and independent the court was. Other disappearing pie-poudre courts of the period included Southampton ([Anon.] A Description of England and Wales, Containing an Account of Each County (London,1769-1770) volume 2, 172), Chipping Norton, Chipping Wycombe and Henley ('First Report of the Commissioners appointed to inquire into Municipal Corporations of England and Wales...' BPP Sess. 1835, 23 (116), 171,178,208), and Portsmouth (VCH Hants and Isle of Wight, 3, 182). On the decline of pie-poudre courts in general, see John Pettingell 'Of the Courts of Pypowder' [1762] Archaeologia [third edition], 1 (1804), 210-24.

[2] Verena Smith (ed.) The Town Book of Lewes 1702-1837 (Lewes,1973), 85 entry for 7 September 1790. See also Andover Corporation minutes cited in J.E.H. Spaul (ed) Andover Archives: The Bailiwick 1599-1835 (Andover, 1971), 15, entry for 8 September 1820.

regulation into the hands of the corporation proper. One solution was to combine the features of the market court with those of the courts leet or baron of the town at first; this proved particularly useful where corporations held market prescriptive rights themselves from local lords or where local courts of request were stronger than local administration. However, larger - and more financially stable - corporate bodies made great efforts to extend their control over the market by transferring the administrative and legal responsibilities of the market court to their own hands. The only national survey of these market courts - made by the Royal Commission on Municipal Corporations in 1835 - revealed, indeed, that the office of clerk of the market was no longer held separately from the other elected posts of town councils and corporations. In nineteenth century England, the Mayor usually held the position of clerk as a largely honorific and ceremonial duty along with a good many other titles bestowed upon him for the sake of custom (Table 4.1).

Table 4.1: Appointees to the position of Clerk of the Market in the surveyed corporations and boroughs of England and Wales,1835.

	N	%
Mayor	78	71.6
Bailiff	12	11.0
Created post	12	11.0
Alderman	3	2.8
Portreeve	2	1.8
Sub-bailiff	1	0.9
Sergeant	1	0.9

Source: 'Analytical Digest of the Reports of Commissioners on Municipal Corporations in England and Wales...'BPP Sess. 1839 18 (402),120-22.

Only 11% of the surveyed towns had especially created the post of clerk of the market or equivalent and in half of those cases the clerks had been nominated either by the entire council or by the Mayor. A brief survey of some councils suggests that in all too many cases the specially created post of clerk fell to a nephew or brother of a council official. Furthermore, in about two-thirds of councils, council representatives were elected for life [1] and no doubt continued to hold the office of market clerk long after they were physically able or willing to take on the task of supervising market transactions.

Yet process in market courts of any description - pie poudre, leet or clerk's courts - represented a very small part of the framework of law that guaranteed a hearing to small pleas in early nineteenth century England. Indeed, few market courts allowed townspeople the opportunity to take personal actions for small claims against market traders or others (Table 4.2). All forms of market court were intended, after all, not to dispense local justice but to refer cases to higher local or shire courts for arbitration and judgment. The power of the clerk was, in the words of the seventeenth century jurist William Sheppard, '...much lessened by the distribution of it to, and exercise by, Justices of Assise [sic], of Oyer and Terminer and Justices of the Peace...' [2], and the closure of so many

[1] A.F. Fremantle England in the Nineteenth Century Volume 1: 1801-1805 (London,1929), 176.

[2] W[illiam] Sheppard Of the Office of the Clerk of the Market, or Weights and Measures and the Laws of Provision for Man and Beast (London,1665), 117-20. The Act regulating the activities of the Clerk, 16 Car.I c 19, failed to deal adequately with the problem of the duplication of responsibilities. (See Thomas Walter Williams A Compend -ious Digest of the Statute Law from Magna Carta to the Twenty- Seventh Year of the His present Majesty King George III (London, 1787), 70).

market courts by 1835 suggests that in the late eighteenth century this transfer of responsibility was reaching a crescendo of administrative reorganisation. These courts were, after all, intended principally for summary arbitration and not for complex cases. In courts of pie poudre an injury had to be reported to the court 'within the compass of one and the same [market] day...'[1] for the case to be heard. This relatively restricted period for the settling of disputes had significant consequences for corporate owners, for if they could maintain evidence of ownership merely by providing regulatory courts, they might dispense with these smaller courts and consolidate legal power in the Mayor's court or even the shire and assize courts. Market traders lost thereby the great benefits of the small market courts, which the contemporary jurist Wooddeson described as their '...easy and prompt modes of redress'[2]. Similarly where manors held the rights to markets or fairs as an ancient privilege, land stewards and borough clerks, through the Court Leet or Court Baron, could only exercise the right to refer cases concerning market illegalities up to higher courts [3]; where these privileged jurisdictions could be separated

[1] Richard and John Burn A New Law Dictionary : Intended for General Use as well as for Gentlemen of the Profession (London,1792) volume 2, 208.

[2] Robert Wooddeson A Systematical View of the Laws of England ; as treated of in a course of Vinerian Lectures Read at Oxford (London, 1792-3) volume 1, 101. Compare William Blackstone Commentaries on the Laws of England [fifth edition] (London,1773) volume 4, 275 on the status of the office.

[3] Giles Jacob The Complete Court Keeper; or Land Steward's Assistant eighth edition (London,1819), 57; Henry Fellowes The Laws Respecting Copyhold and Court Keeping (London,1799) esp. pp. 134 ff.; John Ritson The Jurisdiction of the Court Leet (London,1809); Richard Barnard Fisher A Practical Treatise on Copyhold Tenure with the Methods of Holding Court Leets, Courts Baron and other Courts (London,1794). On the effect of the decline of such courts upon other forms of property holding not discussed here, readers will recall J.L. and Barbara Hammond The Village Labourer 1760-1832 (London,1911), Chapter 1.

from ownership and the court's powers transferred, little stood in the way of such a move. Indeed, in Abingdon in 1788 the court leet acted as the court of the clerk of the market because no doubt it was easier and more convenient for all concerned that the reference of troublesome cases to higher courts should be accomplished efficiently and without the need for two courts [1].

Nevertheless, what little power the clerk or market court had now passed to the corporations of towns and into the hands of the mayoralty in particular. After Rex v. Marsden, therefore, the regulatory power of the corporations and councils guaranteed their ownership and secured their property rights in markets. Either toll-taking or regulation provided evidence of ownership, and consequently - as at Lewes - only one of the two needed to be maintained. This significant reduction in the transaction costs involved in market operation resulted from the relatively light burden of the clerk's court being substituted for the more onerous duties of toll collector. Indeed, the fact that toll prescription was actively 'farmed out' in the course of the late eighteenth century and early nineteenth century, as shall be demonstrated, suggests that councils were

[1] Presentments of the Court Leet acting as the Court of the Clerk of the Market, Abingdon, 1788, Berks. R.O. JM 4/2 1-7. In certain other locations similar duality of function appears to have been common. Examples include Gilbert White's Selbourne, where Magdalen College, Oxford, combined the courts leet and baron with the purely supervisory functions of market court (Gilbert White The Natural History and Antiquities of Selbourne in the County of Southampton (London,1789), 423); Marlborough, where the Court Leet held twice yearly exercised the powers of the Clerk's court ('First Report of the Commissioners appointed to inquire into Municipal Corporations of England and Wales...' BPP Sess. 1835, 23 (116), 219); Winchester, where the Consistory Court of the Bishop exercised powers to maintain the pie poudre Court of St. Giles Fair (Jacob New Law Dictionary, qv. 'Pie Powder Court'); and Westoning in Bedfordshire (VCH Beds. ,3, 453).

not unaware of the very real cost reductions in running the market that might be achieved.

Having now outlined the law relating to market rights at the time of Rex v. Marsden it is necessary to indicate the course of the wider revision of the law of market trade subsequent to the judgment and the evolution of forms of corporate control, the extension of off-site trading through exemption clauses and other means of extending the market while reducing aggregate transaction costs. In part at least this radical change in the

Table 4.2: Jurisdictions for market claims in England and Wales,1835.

	Number of jurisdictions		
	Real, personal or mixed actions	Personal or mixed actions	Personal actions
Any amount	76	12	21
£200-£100	1	3	4
£99 - £40	2	5	13
£39 - £2	1	0	11

Source: 'Analytical Digest...',358-72.

law relating to the functioning of the market was broadly sympathetic with Mansfield's principles in the case. For whilst Rex v. Marsden had established the foundations of the modern law of toll prescription, judgments about ownership was still to be inferred from franchise documents. Only with a further series of judgments between 1802 and 1835 was the historical test of ownership of prescriptive rights finally dissolved. It

is against this background of often subtle yet significant change in the definition of the evidence of property rights in markets that the economic history of market society must be viewed.

By 1802, common law had established a definition of customary usage in association with markets which effectively opened the possibility of prescription to many more owners [1]. In spite of a limitation upon this definition allowed in 1817 [2], it received general and wider acceptance in a more explicit judgment in 1823, in which the legal requirements for prescription ownership by custom were clearly indicated [3]. In the case of Rex v. Jolliffe in that year twenty years usage, where uncontradicted, was held to be sufficient evidence for the existence of a market. Grounds for contradiction of this plea on grounds of usage might now only be found in evidence of the discontinuity of the operation of the market or, in subsequent judgments of the court, in the insufficiency of market accommodation and trading facilities [4]. Where market prescription rights were now lost or franchises had disappeared, juries were to be directed to

[1] Rex v. Smith (1802) 170 ER 659-60. This new law of prescriptive rights in markets was but part of what one scholar has suggested was a general revision of the doctrine of prescription in law and constitutional theory from the late eighteenth inspired by Burke. As such it contributed to some degree toward the general redefinitioon of rights in property and terms of contracting which is explored in greater detail below. P. Lucas 'On Edmund Burke's doctrine of prescription : or an old appeal from the new to the old lawyers' Historical Journal. 11 (1968), 35-68.

[2] Rex v. Cotterill (1817) 106 ER 25-30.

[3] Rex v. Jolliffe (1823) 107 ER 303-07.

[4] Only in the Lords' judgment in In re Islington Market Bill (1835) 6 ER 1530-34 was this corollary given substance through a full definition of the duties of owners.

decide cases of disputed ownership simply on the basis of the test of usage [1]. In short, within a very few years ownership and control by prescriptive right rather than franchise was referred to the very test of custom already used in cases related to disputed ownership by title.

Through the definition of 'immemorial existence' and the transfer of decisions concerning prescription to juries, market ownership by title or custom and the separable rights to take toll were freed from the earlier constraint of interpretation solely on the basis of the foundation document [2].

Yet it was precisely in relation to prescriptive rights such as toll-taking, rights which many owners sold off during the course of this period, that the legal reform of market property rights lagged behind organisational and institutional change. Toll allocation was in fact central to the contemporary legal discussion of the ownership and organisation of the market. Toll prescription was of importance not only because the evidence from custom of toll taking now constituted ownership evidence, but because it required an effective and efficient machinery for enforcement and administration. Only in relation to the administration of toll did nineteenth century courts place control again in the hands of owners rather than users or perscription holders. In the course of Rex v. Marsden. Lord Mansfield indicated that toll was indeed a sign of ownership in whatever form it appeared: whether toll was taken as pennage, stallage,

[1] Mosley v. Walker (1828) 108 ER 640-46.

[2] See Mayor of Hull v. Horner

piccage or entry-toll it might still be taken to imply the right to receive the profits of a market. This uncontradicted assertion (it was eventually to receive statutory support in the form of the Prescription Act of 1832 [1]) was taken to mean that owners would always set reasonable tolls and that they would only set tolls to be paid at the market site. Certainly existing case law had established that the ownership of a title to a franchise allowed the lord of a market to impose a reasonable toll. What remained to be established, and still remained unsettled after 1765, was the point at which goods going to market became liable for toll and little effort appears to have been expended before 1835 in framing an adequate definition of the 'reasonable toll' the owner might take. Broadly, the courts inconsistently but frequently found in favour of owners after 1765, but so unsatisfactory was this state of affairs that throughout the early nineteenth century traders challenged the rights of owners and prescription holders to take toll where and when they chose and their right to remove markets.

The taking of toll before goods arrived at the market proved to be particularly contentious not least because of the reportedly large scale of attempted evasions. Evasion of toll by sale in a contiguous part of the

[1] 2 & 3 Will. IV c.71. By this legislation markets or fairs were no longer to be regarded as easements or 'profit a prendre' within the terms of the Act.

town was held to be an interference with the title of the owner [1].

Prosecutions against those who challenged the title were therefore common and owners and prescription holders proceeded against those who sold near to their markets in contravention of the law. Yet in the treatment of these cases the courts exercised very little consistency of interpretation. In 1809 a King's Bench case gave unconditional support to the earlier principle that prescription of toll was available to an owner or prescription holder from all goods brought to the area of the franchise on market day [2]. By 1821, however, a judgment of equal distinction specified that no prescription should be allowed for goods not actually brought into the market [3], though in a superior judgment brought in the same year in one of the cases ancilliary to the contest over the new Reading market the earlier principle was again given the status of current law [4].

This indecision in the courts did not reflect any uncertainty about the

[1] The leading cases in this matter were Mosley v. Chadwick (1782) 99 ER 568-71; Mayor of Northampton v. Ward (1746) 93 ER 1155. See also Rickards v. Bennett (1823) 107 ER 83-88 and Mosely v. Walker (1828) 108 ER 640-6. The metropolis appears to have been an exception, seventeenth century cases allowing the selling of fish outwith Billingsgate (William Illingworth An Inquiry into the Laws Antient and Modern respecting Forestalling, Regrating and Ingrossing (London,1800), 17; Alexander Pulling A Practical Treatise on the Laws, Customs and Regulations of the City and Port of London as settled by Charter, Usage, By-law or Statute (London, 1842), 411).

[2] Hill v. Smith (1809) 103 ER 856-61.

[3] Wells v. Miles (1821) 106 ER 1041-44.

[4] Vines v. Mayor of Reading (1826) 130 ER 670-671. The farming community clearly regarded Vines as leading and indisputable authority hereafter. See 'News of Agriculture, Rural Economy etc. ' British Farmers Magazine I 1826-7, 264.

nature of ownership and its powers but rather the lack of any simple definition of the limits of the market. Consequently, many market committees of traders and representations of traders for new facilities produced bills before Parliament which deliberately and explicitly restated the 'limit of the market' in the early nineteenth century. In the improvement and market acts of these years, the growing dissatisfaction of traders with limitations upon the places in which trading were allowed appears. The most fundamental of private rights (to trade from one's own house in spite of the market on a market day) was assured in these acts, either through the use of previously scheduled bye-laws or by express confirmation of the right in the market act itself [1]. The Exeter market improvement act of 1820, for example, declared 'That nothing herein contained shall extend or be construed to extend to prevent any Person or Persons from selling or exposing to Sale any live Cattle or Beasts, being his, her or their own Property only, in his, her or their own Yards and Premises only, within the said City and County [of Exeter]' [2]. This quiet but successful reaction to old restrictions [3] guaranteed traders and farmers a limited amount of trading freedom (although regrating naturally remained illegal for farmers).

If the law relating to the 'limit of the market' remained undecided, to the apparent advantage of the trading community, the law of market removal moved almost entirely in the direction of giving absolute power to owners

[1] e.g. 55 Geo. III c.85 s.111 (Bodmin); 51 Geo. III c.172 s.18 (Gosport); 56 Geo. III c.25 s.23 (Cowes).

[2] 1 Geo. IV c.78 s.10.

[3] Under 1&2 Phil. & Mary (Sess.1) c.7.

and toll rights holders before reverting to a position of benevolent neutrality - giving neither traders nor owners an absolute advantage. Nineteenth century courts at once extended the right to remove but limited the circumstances in which removal might take place, to the disadvantage of prescriptive rights holders. Whilst recognizing an inherent right (as part of the title to a market) to remove the market from '...time to time to a convenient place...', Curwen v. Salkeld (1803) both limited the right of traders to return to the old market site and enforced the obligation upon owners to remain at the site named in the franchise [1]. In succeeding years, the hands of the trading community were strengthened by gaining the additional advantage of appealing a franchise on the grounds that the owner had provided inadequate accomodation [2]; further, where the owner of a market was not also the landowner of the market site (where, for example, the landholder had leased or sold toll collecting rights) removal was not allowed to deprive the landowner of any of the future revenues he might expect [3].

A conclusion upon the legal history of market property rights in the course of the late eighteenth and early nineteenth centuries is almost certainly to be expected to be equivocal. Without the distinction between toll ownership rights and title or franchise rights in Rex v. Marsden both the motivation for and economic gain from subcontracting toll collection and associated rights would have been reduced. However, what the courts

[1] 102 ER 703-06.

[2] Rex v. Cotterill (1817) 106 ER 25-30.

[3] De Reutzen v. Lloyd (1836)

gave with one hand they removed with the other. Owners and traders remained in conflict in the courts well into the later nineteenth century over these contentious issues. Without the organisational and institutional revolution in market property rights, indeed, legal change would have been insufficient to reduce aggregate transaction costs in market trade. Institutional innovation by traders and toll holders, by corporations and by their officers individually effectively reduced the costs of policing markets. Yet the legal history of the period belies the complexity and the radical nature of these changes in the organisational structure of the institutions of market capitalism, for as we shall see institutional adaptation to new conditions of market transaction occurred in the eighteenth and nineteenth centuries when markets still predominated and before firms and alternative hierarchies replacing the allocative market mechanism were in place. All of these forms of adaptation to new conditions of marketing had one thing in common: the property rights in markets became the object of fierce competition, rivalry between owners and non-title holders, cooperative ventures between owners and prescriptive rights lessees and various intermediate arrangements - some with the distinctive allocative advantages of firm-type hierarchies. Indeed, whilst the law failed to arrive at a satisfactory - optimal - allocation of property rights between title holders, prescription holders and traders until much later in the nineteenth century, the institutional innovation characteristic of the early nineteenth century may be understood not as the result of the absolute decline of the formal market but rather as the adaptation of its form to meet novel conditions of exchange in a hybrid form of organisation with some of the characteristic features of the

classical nineteenth century firm and some of the older, more tenacious and perhaps efficient, features of the traditional provincial market. To understand how this happened, it is necessary to observe individual market rights in this process of transition. With scanty evidence and bearing in mind the fact that much must of necessity be missing from the record of what little survives, it is neverthless possible to discover how the process of redefining rural market rights occurred and how these elementary institutions changed after 1780.

CHAPTER FIVE: THE PROPERTY RIGHTS IN MARKET EXCHANGE, 1780-1840.

> 'If property be an unconditional right, emphasis on its obligations is little more than the graceful parade of a flattering, but innocuous metaphor. For whether the obligations are fulfilled or neglected, the right continues unchallenged and indefeasible' [R.H.Tawney, 1926]

Market centres were, of course, much more than just places for buying and selling commodities. They acted as the social centre of towns and, in the more prosperous settlements of the south of England, offered local gentry and the affluent a fashionable resort and an attractive meeting place in the town. At Northampton the market area was noted by one visitor to serve the function of a 'fashionable mall for the ladies to walk on...' [1] and at Horsham the walkway leading to the market centre offered a secluded area for courting couples [2], while at Exeter the Market place near the cathedral was used as the site for a 'Grand Menagerie of Foreign Beasts and Birds' [3]. This 'fashionable' function of the market site, often forgotten by historians, was no doubt important in some towns but not in others. For the rural working family, however, the market was the regular resort for community entertainment; fairs, bull running, celebrations and exhibitions all made appearances in the larger market Towns of England

[1] 'Journal of a Tour of the Midlands, East Anglia etc...' September 1790, James Plumtre MSS., CUL Add. MSS. 5794 fols. 16-16v.

[2] 'Travel diary of three weeks tour in S.E. England, 1785 [by] Elizabeth Collett', typescript transcription, 1947, Bath P.L. [no acc. no.], 6.

[3] Historical Manuscripts Commission Report on the Records of the City of Exeter (London,1916), 259-60.

[1], though the smallest and least frequented often brought visiting tradesmen which proved reason enough for celebration. At this extreme of size the 'market' at the then small town of Swindon in Wiltshire (now the Old Town) consisted for much of the early nineteenth century solely of the appearance of one Mr. Tidd from Dammas Lane who sold meat in the square from a wheeled cart once a week; Mr. Tidd's appearance, according to one contemporary commentator, brought children into the market street to play and dance [2].

Whether large or small, then, markets were centres of social as well as of commercial intercourse. Yet the size of the market certainly determined how far it might be a place of recreation as well as a site for trade - how

[1] See inter alia R.M. Wiles 'Crowd Pleasing Spectacles in Eighteenth Century England' Journal of Popular Culture, 1 (1967), 90-105; Bob Bushaway By Rite: Custom, Ceremony and Community in England 1700-1880 (London, 1982); Robert W. Malcolmson Popular Recreations in English Society 1700-1850 (Cambridge, 1973).

[2] Mark Childs 'Aspects of Swindon's History' mimeo of typescript, [revised edition], 1973, Swindon LSL [no acc.no.], 26; Diary of Thomas Goddard, 1810, Swindon LSL, Goddard MSS. 1397 fol. 5v. One must remember that, as one contemporary account of the district remarked, most roads to the town were impassable for most of the year ('Un Officier Francais Emigre' Promenade Autour de la Grande Bretagne precede de Quelques Details sur la Campagne du Duc de Brunswick (Edinburgh, 1795), 135-6). Thomas Dearn describes the absence of the market at Smarden in Kent and its replacement by visiting 'higglers' like Tidd as a 'judicious arrangement' which gave more time to villagers to pursue other interests, T.D.W. Dearn An Historical, Topographical and Descriptive Account of the Weald of Kent (Cranbrook, 1814), 219. (See also the description of the higgling trade of Reading in John Man The History and Antiquities, Ancient & Modern, of the Borough of Reading in the County of Berks. (Reading, 1816), 167). Cf. the experience of the rural Midland villages, J.M. Martin 'Village traders and the emergence of a proletariat in South Warwickshire, 1750-1851' Agricultural History Review, 32 (1984), 179- 188; and, for other parts of England, John Clapham An Economic History of Modern Britain: The Early Railway Age, 1820-1850 [second edition] (Cambridge, 1930), 221-222 remains the best source.

many people, for example, might attend a market day parade or war victory celebration was determined by physical space rather than by anything else. In fact, the majority of English provincial markets were small and relatively cramped for space. Table 5.3 below presents an estimate of the distribution of corn market areas for a sample of market towns in southern England during the period 1745 to 1840 using the cartographic evidence of numerous small maps and plans of the towns and cities of Britain published in the period. Both the relatively small scale of the maps utilised in the survey and the small number located of sufficient merit limits the representative character of the distribution. However, the broad categories of market size offered in the table can be easily distinguished even on very small scale maps; even small scale town plans and the vignette plans of towns on county maps therefore offer some useful evidence of the size of the market that can be made use of [1].

The majority of markets fell within the category of 10,000 ft^2 to 59,999 ft^2 (or approximately 100 feet by 100 feet to 245 feet by 245 feet) in area, allowing only limited trading in a confined space. The reality of much of the popular experience of market society during the late eighteenth and early nineteenth centuries was indeed that cramped conditions and busy trade reduced the attractiveness of markets as centres of recreation and even of trade.

[1] For a justification of the use of small scale maps of this period in historical research, see Mark A. Gray 'The Use of Small Scale Maps in Local History Research' Quest: Journal of the Avon Local History Association. 9 (1979), 5-9.

Table 5.3: Sample market areas for the sale of corn, c.1780-c.1850.

Area of market/building (ft^2)	N	%
0 - 9999	9	18.75
10000 - 29999	14	29.17
30000 - 59999	11	22.92
60000 - 89999	5	10.42
90000 - 119999	2	4.17
120000 - 149999	2	4.17
150000 +	5	10.42

Sources: See Bibliography below.

With this atmosphere of business and excitement village life could not compete. Whilst itinerant hawkers and traders undoubtedly brought news from far afield and new goods, their personal mystique was quite another pleasure from the community world of the market. What made markets so important in the rural world, then, was their very familiarity blended with the opportunity for a little indulgence. Similarly, at fairs which merely extended market trading through the week, a practice much on the increase

throughout our period [1], entertainment and social intercourse were as much a part of the functioning of the market site as marketing itself. At Salisbury's Michaelmas fair in 1796, for example, (a unique extension of the weekly market to accommodate cheese sellers from Hampshire who, in that year, had failed to sell all of their north Wiltshire cheese at Andover) a Camera Obscura was exhibited alongside the cheese sellers and garden produce stalls which made up the majority of the pitches licensed by the market court [2]. 'Pleasure fairs', almost certainly an eighteenth century invention [3], were naturally more successful than day fairs at providing entertainment, but were ususally located outside of towns and away from market squares. Yet whenever trade was established in it the market place served the function of playground, meeting place and entertainment venue as well as private meeting place and rendezvous for rural gentry. In this sense, the market 'belonged' to every part of the social order of the rural communities of southern England and 'belonged' to the people of the rural hinterland of the market town as much as to urban consumers.

In spite of this communal use of the market and the central role of the market place in defining local communities, the private ownership of market property and rights to market tolls was fundamental to the structure of the

[1] Wendy Thwaites 'The Marketing of Agricultural Produce in Eighteenth Century Oxfordshire' (unpublished D.Phil. dissertation, University of Oxford, 1981), 77. Cf. the experience of northern day-fairs in S. Ian Mitchell 'Urban Markets and Retail Distribution 1730-1815 with particular reference to Macclesfield, Stockport and Chester' (unpublished D.Phil. dissertation, University of Oxford, 1974), 33-38.

[2] Daybook of Salisbury Market and Day-Fair, 1796-1804, Wilts. R.O. G/23/1/29 fol. 2.

[3] Malcolmson Popular Recreations, 23.

eighteenth and nineteenth century rural economy. Control over property rights, as we have seen, determines who pays the transaction costs involved in exchange. The indeterminacy of property rights requires bargaining resources to be devoted to establishing ownership and control. Consequently non-market hierarchies devote much energy and resources toward the specification of property rights where the exercise of establishing ownership is relatively costless. Much of this activity is, of course, social and particularly legal; non-market hierarchies seek to discover those means of unequivocally establishing their ownership of assets which most effectively and costlessly ensure the continuity of their profit or income generation. Market institutions during the period under study here similarly viewed rights in markets and tolls as essential to the efficiency of market economy itself. Throughout the late eighteenth and early nineteenth centuries traders and market owners entered into the contest for prescriptive rights over market trade reflected in the legal history of markets discussed earlier. However, whilst the legal history of the period offers some indication of the general tendency toward corporate rights in markets and away from old and long established ownership, it cannot indicate how far that tendency was dominant during the period. Indeed, precisely because the important determinant of communal ownership rights to property in markets was the specification cost of the legal responsibilities associated with markets, the legal history of market ownership should be studied in relation to the contractual obligations and duties allowed at law. The increasingly unfavourable definition of prescription holders' responsibilities we uncovered earlier was, I shall argue, entirely consistent with the transfer of property rights and

therefore of the associated transaction costs from public corporations and councils to private individuals and groups and the creation of subtle alternatives to market hierarchy.

Yet, as has already been noted, exceptions to the general pattern of legal evolution are evident in the historical record, the significance of which should not be overlooked. Neither the documentary nor the legal evidence of changing conditions for the holding of property rights in markets can suffice independently of one another. In no small number of cases local gentry title holders won long and often costly contests in spite of new found corporate influence and the balance between the apparently frequent appeals by corporations of market towns or private presumptive owners which received support at law and the successful resistance of the holders of prescriptive rights cannot be assessed quantitatively. Nevertheless, several legal battles between would-be corporate owners of prescriptive rights and noble families are recorded during the period. In Tiverton in Devon, for example, the urgency of repair noted in a report of 1824 initially prepared at the behest of traders (though later supported by the Town Council [1]) encouraged a challenge to the rights of the local prescription holder through the courts, a process not finally resolved until 1831; the council, it should be noted, lost the case and any hope of establishing property rights over market tolls [2]. Not only were title

[1] Printed report to the inhabitants of Tiverton, with additional notes on the state of Tiverton market, 1824, Devon R.O. Penny and Harward MSS. 1044 B/27.

[2] Times 19 October 1831. On the history of the dispute see Lt. Col. Harding The History of Tiverton in the County of Devon (London, 1845) volume 1, 138.

owners to prescriptive markets frequently uncooperative and tried a number of ways in which to hold up the movement toward wider ownership, they frequently flouted the spirit if not the letter of judgments against them. Lord Sherbourne, perhaps an exceptionally recalcitrant example, not only opposed the Paving Commissioners of Cheltenham in their application to the courts for the right to build a new market upon his old, title market, site but further leased the tolls of the old market to a private individual against the wishes of corporation and traders alike [1]. Similar opposition to the transfer of new rights to corporate bodies and the creation of new markets came, naturally enough, from other adjacent market towns threatened by the establishing of superior facilities nearby. Also in Devon, and of similar contemporary infamy to the case of Tiverton, the grant of a new writ of 'ad quod damnum' to Sir Bourchier Wray to open a market on his own behalf at Ilfracombe in 1802 [2] brought protests from nearby Barnstaple. Barnstaple, noted by one informed contemporary in 1779 as a market town which attracted 'farmers from thirty parishes to cross the bridge...to bring their produce to it...' [3], felt the threat to its own trade from the revived market and openly objected, sending a copy of the

[1] Gwen Hart A History of Cheltenham,(Leicester, 1965), 298-99; [Anon] The Stranger's Guide to Cheltenham and Its Environs,(Cheltenham,1832), 122.

[2] Writ of inquisition ad quod damnum, September 30, 1802 PRO (CL) C202/190/42.

[3] 'Memorandums of a Tour of the West of England'[1796] BL Franklin Papers Add. MSS.47771 vol IV fol. 59. In 1791, the Cambridge tourist E.D. Clarke noted that Barnstaple market had more stock than Covent Garden market, E.D. Clarke A Tour Through the South of England, Wales and Part of Ireland,made during the Summer of 1791 (London, 1793), 127.

Town Council's resolution on the matter to London [1].

However these contests for the control of the market ended, they almost always began with the protest of the traders who used market facilities at the poor state of the square and its buildings. The slight space available in some of the markets recorded in our sample (Table 5.3 above) were the direct cause of the frequent complaints of traders about market facilities; and where community interests conflicted with those of commerce the latter almost invariably came to dominate. Yet the complaints of general dilapidation were not restricted to the smaller or older markets during our period, and many complaints and opinions of locals about their market survive in contemporary topographical literature. The prosperous town of Maidenhead in Berkshire, which had gained an important position for itself in the London hinterland as the source of most of the barge traffic down the Thames to the Surrey docks, was neverthless left with a market house beneath the Town Hall 'built of timber and plaister [which was]...old and ruinous'; and in the nearby town of Newbury the market house was described as being 'built of timber,laith and plaister and in indifferent repair...' [2]. In Cheltenham in 1811, the market house on the market site

[1] Resolution of Barnstaple Corporation against the opening of Ilfracombe Market, 1802, N.Devon A Lib. MSS. Acc. 1767. See also Royal Cornwall Gazette 7 November 1802. Cf. the case of March market, 'RC on Markets...', 1, 225.

[2] [Anon.] A Description of England and Wales, Containing an Account of Each County (London,1769-1770) volume 1; 59,96. For similar comments concerning other towns, see volume 1, 25-5 (Bedford), 39 (Woburn), 86 (Abingdon), 103 (Wokingham); volume 2, 144 (Kellington), 167 (Truro); volume 3, 234 (Melcomb Regis); volume 4, 114 (Gloucester); volume 5, 62 (Canterbury); volume 7, 197 (Thame). For later stories of delapidation, see Samuel Lewis A Topographical Dictionary of England [seventh edition] (London,1849) volume 1, 6; ibid. volume 2, 12.

owned by the unmoving Lord Sherbourne even collapsed, mercifully without causing any injury; elsewhere there was a real cost in lives for the poor state of market buildings [1]. Of course the imperfections of the market were not always as serious or as lethal. A common contemporary complaint, for example (possibly the most common), was of the obstruction of market crosses which blocked the way of carts and wagons entering the market on market day. Following his extensive tour of the Cotswold towns in the late 1780's, William Marshall observed:

> Market places never struck me, as a subject entitled to particular notice, until I saw the good effect which has taken place, by a reform in the market places of this district.
>
> In 1783, the markets of Gloucester, Tewkesbury and Cheltenham were kept on old fashioned crosses, and under open market houses, standing in the middle of the main streets; to the interruption of travellers, the disfigurement of the towns, and the inconveniency of the market people, whether sellers or buyers.
>
> Now, [1788] these nuisances are cleared away, and the markets removed into well situated recesses, conveniently filled up for their reception [2].

Elsewhere, too, market crosses came down where the 'market people' objected to their inconvenience. When a German visitor, S.H. Spiker, reached Salisbury during his tour of the country he made particular notice of the

[1] Berrow's Worcester Journal 31 January 1811. Similar accidents at London's Clare Market and in 1790 at Cloth Fair in Smithfield, gained more public attention, when collapsing buildings surrounding the market crushed several people to death. See W. Toone A Chronological Record of the Remarkable Public Events, Political, Historical, Biographical, Literary, Domestic & Miscellaneous during the Reigns of George the Third and Fourth and His Present Majesty (London, 1834), 146; William Connor Sydney England and the English in the Eighteenth Century : Chapters in the Social History of the Times (London,1891) volume 1, 41.

[2] William Marshall The Rural Economy of Gloucestershire [second edition] (London, 1796), 105-106.

market poultry cross which still stands at the corner of the market square and at the only entrance to the market from the north – a market cross which remained in place, he thought, in spite of a contemporary fashion for their removal [1]. Across the rural south this 'fashion' appears to have begun in the late 1770's and to have reached epidemic proportions by the beginning of the nineteenth century. A simple but effective means of improving access, all eviating the anxieties of buyers and sellers and attracting greater trade such as the removal of market crosses might staunch the flood of complaints about poor market conditions in southern provincial towns. Complaints from traders about the state of the market did, of course, move some of the town corporations to take more comprehensive action, but sometimes traders had to take matters into their own hands. In 1804 the graziers of Aylesbury, dissatisfied with the existing provision for fatstock penning and selling in the market square, set up their own market [2].

Fear of the law and owners' rights nevertheless dissuaded many unhappy traders from this drastic form of action, so petitions and letters of protest more frequently began the campaign for better facilities. There is considerable evidence of these kinds of protest in a number of southern English towns throughout the period of the late Georgian age. In Devizes in

[1] S.H. Spiker Travels Through England,Wales and Scotland in the Year 1816 (London,1820) volume 2, 140. Cf. The Salopian Magazine and Monthly Observer (London,1815) volume 1, 554; Norwich Chronicle 17 March 1792; CUL Add. MSS. 5794 fol. 18v. for reports of exceptions to this apparent rule in Shrewsbury, Norwich and Worcester respectively.

[2] George Lipscombe The History and Antiquities of Buckinghamshire (London, 1847) vol 3, 31.

about 1803, for example, a number of traders petitioned the town council in the following terms for new buildings:

> We the undersigned Dealers, Farmers and others attending Devizes Market beg to represent to you the very serious loss to which we have been subject for many years in consequence of the inconvenience and the damage occasioned to the Commodities in which we deal by exposure to the rain in wet weather. We submit that could a convenient Site be procured near or adjoining the present Market Place for the erection of a covered Building for the Corn Market, It would not only be a personal accommodation to ourselves but we think it would add to the respectability and tend to increase the Trade of the Town at Large - We think also the removal of the Corn Market to another site would materially improve the accommodation for Cattle etc. and prevent the Annoyance at present occasioned by the public Roads and pavements being impeded - We therefore request that a better accommodation be provided for the transaction of our business [1].

Arguments of this variety - particularly that new facilities would attract new business to the town - were frequently cited in petitions and, presumably in recognition that owners might actually be impairing the economic development of the local community, corporations and councils sought control over the market with this factor in mind. When in 1818 the Bedford corn dealer J.H. Warden sought to persuade the town authorities of the need for new facilities for a 'pitched' market to replace the small 'sample' market instead of the grant of a new, free, market, he wrote that '...if we had a Pitched Market for Corn it would add more to the respectability of the Town, as well as advantage to the farmer and dealer,

[1] Petition of traders of Devizes for a new market [c. 1803] Wilts. R.O. G/20/1/89. Similar arguments were made by the 178 farmers and dealers of Devizes who petitioned for new market accommodation in 1836. See James Waylen Chronicles of The Devizes (London, 1839), 219. Cf. Records of the Borough of Nottingham being a series of extracts from the Archives of the Corporation of Nottingham Volume VIII: 1800-1835 (Nottingham, 1952), 415-416.

than anything that could be done for a toll-free market' [1]. Often traders were well organised and, as in Cambridge, encouraged the council by supporting the preparation of detailed plans for the removal of the existing market, the raising of new capital for the new building and the arrangement of subscriptions. In Cambridge, indeed, the market committee planned the relocation of all the town markets in 1787 with both advice and finance from the local tradesmen [2]. During the discussions which led to the rebuilding and relocation of the all of the facilities used in Cambridge, farmers, traders and small dealers in the less important goods sold in Cambridge markets were involved in the debate [3]. Similarly, when Worcester's hop market became too small for the many growers and dealers who wanted to use it, the Mayor and Justices decided, after petitions from

[1] Huntingdon,Bedford,Cambridge & Peterborough Gazette and Northampton General Advertiser 7 February 1818. In many petitions and appeals traders thus suggested that conditions of marketing themselves would be improved; at Bath, for example, the institution of a new cattle market would offer the opportunity for the sale of the 'most excellent varieties' only (William Matthews A Dissertation on Rural Improvements; Being the Substance of an Introduction to the Ninth Volume of the Letters and Papers of the Bath and West of England Society (Bath,1800), 49). For further evidence of the use of these sorts of argument in petitioning and market reconstruction schemes, see Thwaites 'Marketing of Agricultural produce', 21, 102-03; Malcolm Graham 'The Building of Oxford Covered Market' Oxoniensia, 44 (1979), 81-91; Verena Smith 'The Lewes Market' Sussex Archaeological Collections 107, (1969),87-101;Alec Holden 'Greenwich Market' Transactions of the Greenwich and Lewisham Antiquarian Society, 7 (1961), 15-24; Maureen Boddy and Jack West Weymouth: an illustrated history (Wimbourne, 1983), 106; K.A. MacMahon 'The Street in Eighteenth Century Kingston-upon-Hull' Publications of the Georgian Society of East Yorkshire, 5 (1961), 43-66.

[2] Printed notice regarding the relocation and rebuilding of Cambridge markets, 1787, Cambs. R.O. P25/28/4. In the case of Cambridge, the reason given by traders for the need for a programme of relocation and repair in 1787 was that, if the inhabitants agreed to pay for paving, better access to markets was bound to increase their trade.

[3] Cambridge Intelligencer 11 February 1787.

the traders themselves, to keep open the markets longer each week [1]; and when the market at Abingdon in Oxfordshire became too inconvenient, petitioners called for both more space and more time to trade [2]. Whether new accommodation was required, or merely more time in which to sell and buy produce, traders' and farmers' requests almost always met with a sympathetic reception.

In most of those cases in which corporate local government supported the appeals of the traders, Parliament rather than law offered the most immediate relief. All but one of the petitions noted above resulted in an act of parliament for the provision of a new market or the removal of old obstacles. These market acts echo the protests of the traders and complaints of exposure to the elements and the effect of location upon the local road network feature particularly frequently in the acts passed between 1800 and 1840 [3]. Similarly, a large number of improvement acts included sections requiring the clearing of old sites and preparation of better market areas, the clearing away of obstacles to trade - like market crosses - and the control of local traffic congestion in the centres of the market towns. At Cowes in the Isle of Wight, Kings Lynn, Oxford, Basingstoke and Bath, for example, slaughterhouses and hogstys near to the

[1] Berrow's Worcester Journal 17 September 1801.

[2] Petition relating to the holding of markets, Abingdon, 1797, Berks. R.O. A/AM 1/2.

[3] See, for example, the market acts relating to Bodmin, 55 Geo. III c.85 [1815] (preamble); Exeter, 1 Geo. IV c.78 [1820] (preamble); Southampton, 51 Geo. III c.172 [1811] (preamble); Frome, 50 Geo. III c.62 [1810] (preamble); Brighton, 50 Geo. III c.38 [1810] (preamble and s.36).

site of trading were required to be removed [1], whilst in other towns, such as Andover, Frome, Brighton, the village of Bathwick near Bath, Bognor and Cheltenham, carriages left in the street and impeding free passage to the market were to be fined and removed [2]. These seemingly minor arrangements included in improvement, lighting and paving and local government acts often offered the trading community all that it wanted; if carts and waggons clogged the streets and prevented potential customers from arriving at market, removing the market to another site was obviously more expensive than merely instructing the corporation through an improvement act to be mindful of its obligations to traders. Consequently many of the appeals from rural farmers and dealers were answered, not with acts for the regulation or even rebuilding of the market, but with legislation enabling local authorities to improve their towns.

This enabling legislation prepared the ground for the building of new markets, or the remodelling of the old, at local level. Town councils were therefore careful to instruct the drafter of a local bill how they intended to raise the funds for any improvement to be undertaken in markets to accord with the wishes of traders. A range of possible ways of raising the necessary revenue were employed, nearly all of which involved a financial commitment by the whole community, and if not a commitment then a sacrifice. In Southampton, pressure upon space in the market forced the

[1] 56 Geo. III c.25 ss.32,65 [1816]; 43 Geo. III c.37 ss.44,52 [1803]; 52 Geo. III c.72 s.21 [1812]; 55 Geo. III c.7 s.65 [1815]; 54 Geo. III c.105 s.46 [1814].

[2] 50 Geo. III c.62 s.45 [1810]; 55 Geo. III c.43 s.28 [1815]; 50 Geo. III c.38 s.37 [1810]; 41 Geo. III c.126 s.35 [1801]; 3 Geo. IV c.57 s.40 [1822]; 1-2 Geo. IV c.121 s.59 [1821]; 51 Geo. III c.173 s.43 [1811]; 43 Geo. III c.37 s.51 [1803].

Corporation to consider temporary additional marketing facilities in early 1821 [1]. Before the year had passed the problem was substantially relieved by the offer of a site and buildings for a new vegetable market in the Town Ditches from one Mr. Eldridge. Clearly Eldridge did not expect his generosity to go unrewarded. In exchange for the land, the corporation passed the resolution that:

> ...in consideration of Mr. Eldridge having so erected such Buildings he be allowed to receive and take the legal Market Tolls thereof for his own use till some future order is made respecting the same [2].

Although strictly illegal (Eldridge only held the title to the land and not to the market) this arrangement meant that, by forgoing the revenues from the vegetable market for a period of time, the council was able to honour an obligation to the trading community. This illegal practice obviously proved attractive, for at least two other market towns (Huntingdon and Newmarket) decided to take counsel's opinions on the matter into consideration before deciding not to give the rights to market tolls away

[1] A. Temple Paterson (ed.) A Selection from the Southampton Corporation Journals, 1815-35 and Borough Council Minutes, 1835-47 (Southampton, 1965), 30, entry for 27 April 1821.

[2] A. Temple Patterson A Selection, 34.

[1]. As these case opinions pointed out, the exchange of newly created rights in corporate property for buildings or land ran entirely contrary to both the spirit and the letter of the law; private rights in public property designated by the crown could not exist. Consequently individuals could not legitimately be 'sold' a market. Certainly more ingenious and less corrupt means of allowing private individuals to fund the expansion or rebuilding of a market were available, but charity or gifting proved to be exceptional rather than common. Only prominent local patrons could afford the expense of construction whilst forgoing any return. In the small town of Cambourne in Cornwall it would have been difficult to justify the building of a new market until the patronage of Lord de Dunstanville brought one into being in 1802 [2], and earlier in 1783 the Earl of Orford had built a market cross at Swaffham in Norfolk to establish a market at the market hill [3]. Neither took the toll of their respective markets.

[1] Case opinion on market toll rights, [?1827], Hunts. R.O., Huntingdon Corporation MSS. Acc. 2525 box 3 bundle 6; Case opinion on market tolls, Newmarket, 1828, Cambs. R.O. R54/10/9b (verso) [opinion in pencil as reply to submission]. Cf. VCH Berks, 3, 68.

[2] Daniel and Samuel Lysons Magna Britannia being a Concise Topographical Account of the Several Counties of Great Britain (London, 1806), III, 54.

[2] Richard Beatniffe The Norfolk Tour: or Traveller's Pocket Companion; Being a Concise Description of All the Principal towns, Noblemen's and Gentlemen's Seats and other remarkable places in the County of Norfolk 6th edn. (Norwich, 1808), 266. Further evidence of Orford's philanthropy associated with market refurbishment and building can be found in Beds. R.O. KK/880-883. Cf. VCH Beds. ,3, 268. The rationale for such gifts was stated by James Anderson in 1797: 'There are many of the distant hilly parts of Britain, whose prosperity is much repressed by want of markets...; and it much behoves the owners of land in those districts, to remove an evil which diminishes the income they have a just title to expect from their land, to such an astonishing degree'.(James Anderson 'Want of Markets Hurtful to Agriculture' in Essays Relating to Agriculture and Rural Affairs 4th edn., (London, 1797), III, 219). The most obvious advantage, according to later writers in the Ricardian tradition, was that market provision locally increased rents for land ('J.B.' 'On J.D. Jun's 'Theory of Rent'' British Farmer's Magazine, 8 (1835), 565).

Naturally both generous gifts and illegal deals of the type undertaken in Southampton were a means of ensuring the reduction of set-up type transaction costs associated with market exchange. More commonly, however, market committees proposed that, in order to achieve the same effect, the revenue for the building programme should be secured either from the widest possible constituency or through terms so tightly drawn as to bind lessees to covenants for virtual self-regulation. In the process of discovering the means by which popular support for market improvement might be turned into financial support for new building or the clearing away of market impediments, English towns engaged in what we shall recognise as an attempt to partially internalise the functioning of the decentralised market by creating private property rights therein.

The costs of rebuilding or relocating a market could be considerable yet the most common and apparently successful means of raising the necessary funds was, according to the contemporary student of rural economy William Marshall, to raise tolls [1]. However, where major improvements to the whole town were intended, increased rates and levies had more commonly to be used. In most of the significant improvement schemes of the period for county or market towns which included plans for the refurbishment of markets (such as those for Margate, Stamford, Ipswich, Derby, Norwich, Plymouth and Cambridge and, in London, Billingsgate and Smithfield markets

[1] William Marshall The Rural Economy of Gloucestershire (2nd edn., London, 1796), 106. King's Lynn paid for improvements by increasing rentals by between five and twenty per cent following the 1806 improvement Act. Beatniffe The Norfolk Tour, 236.

and the surrounding areas [1]) any and every method of raising funds was employed. Subscription schemes of one variety or another were frequently chosen, not least because only those who supported the improvement schemes would directly benefit as a result; besides, subscribers to a projected building might be allowed to purchase a lease to the tolls of the market thereby. At Tewkesbury in Gloucestershire the historian of the town, William Dyde, reported:

> ...a commodious market-place has been lately erected, at the upper end of Church-street, at the joint expense of twenty subscribers, to whom (in consideration of their having erected such a building) a lease has been granted by the corporation, of the tolls of stallage, for the term of ninety-nine years, at the end of which term, the building and all the profits of the market are to revert to the corporation [2].

This legal means of transferring public rights to private hands was probably consistent with the tendency toward reduced transaction costs associated with market property rights. It represented, in fact, the single most innovative contribution of England to the development of the market in the course of the late eighteenth and

[1] See Times 22 August 1807 (Margate); Huntingdonshire, Bedfordshire, Cambridgeshire and Peterborough Gazette 11 April 1818 (Stamford); Times 30 October 1817 (Ipswich); ibid. 26 February 1821 (Derby); Norwich Chronicle 17 March 1792, Times 16 October 1818 (Norwich's two improvement schemes); Times 9 January 1823 (Plymouth); and Huntingdonshire, Bedfordshire, Cambridgeshire and Peterborough Gazette January 19 1820, ibid. 16 September 1820 (Cambridge); Thomas Pennant A Journey from London to the Isle of Wight (London,1801) volume 2, 146 (Gosport); C. Wills A Short Historical Sketch of the Town of Barnstaple (Barnstaple, 1855), 24 among other descriptions. Bristol, often an exception in the history of market organisation, improved the conditions of the cattle market and raised money for the new Council House by using loans of 4,000 in 1825 - it succeeded because of the profitability of the council's own market ventures (Graham Bush Bristol and Its Municipal Government 1820-1851 (Bristol, 1976), 73).

[2] William Dyde The History and Antiquities of Tewkesbury (Tewkesbury, 1798), 85.

early nineteenth century and appears to have occurred in numerous markets towns throughout the southern part of the country [1]. By transferring the stallage and piccage tolls described in the corporation's market charter, the town council had managed to find something that potential subscribers would purchase at a premium. Furthermore, leasing out the market toll was entirely consistent with municipal law and practice. By leasing the tolls of their market, corporations found that they were able to enjoy all of the benefits of the ownership of unproductive but saleable capital without having to incur any of the costs of repair or removal. After all, tolls for stallage and piccage in particular were difficult to police and costly dues to collect. Were private individuals to collect them on their own behalf, the transaction costs associated with toll based market prescription might be substantially reduced. When Cambridge Town Council sought an opinion of counsel on its plan to sell off tolls and replace them with what it described as 'rents' for stalls and access to the market, it argued that such a move would offer '...both to the seller and the buyer comfort and convenience' [2]. As if to emphasise the very real costs of

[1] Because the 'subscriber' had no substantive meaning in law, subscription clubs frequently referred to their members as 'trustees'; this should not be taken to imply that subscription schemes were organised as legal trusts, however, and the old municipal law of trusts hardly would have applied to them. See 'RC on Markets...', 1, 195 ff. Below the formation of a number of such clubs is discussed. Apart from these detailed instances, see John Wodderspoon Memorials of the Ancient Town of Ipswich in the County of Suffolk (Ipswich and London, 1850), 11-12; Times 24 November 1811; VCH Beds., 2, 260; 'RC on Market Rights...', 2, 134; 'News of Agriculture, Rural Economy etc.' British Farmers Magazine 1, (1826-7), 404; ibid. 2, (1828), 377.

[2] Case for counsel's opinion as to Stallage and Piccage Tolls in Cambridge, 1838, Cambs. R.O., Cambridge City Council MSS. Bundle 101, document 1. In almost identical circumstances, Nottingham had sought clarification on the same point in 1833. See Records of the Borough of Nottingham being a series of extracts from the Archives of the Corporation of Nottingham (Nottingham, 1952), VIII, 423-427.

organising toll collection and administration, the council recalled in the same document the problems that had been experienced in relation to the livestock markets:

> In the Hog and Cattle Market no certain account of the amount of toll received can be obtained. Some Toll was taken on Sale of Hogs and Horses up to the period of the Action brought by the Corporation some years since to establish their right to a Toll traverse in which they failed. Since that event no toll has been taken for sale of any goods in the Cattle Market (except Hogs) which is now used, not only for the Sale of Hogs and Cattle but of dead Goods of various sorts...[1].

Since it was seeking to reduce the costs of maintaining a toll based market the council wished to know whether the plan to replace stallage and piccage charges by rents (such as a 1d per yard of stall frontage in the Vegetable market) would be legal. Sadly for the council, counsel's opinion was that it was not. Nevertheless it was quite legal for councils such as Cambridge to follow the example of other towns and sell or more frequently lease toll rights whilst preserving their charter ownership. This compromise was, in fact, so successful - at Tewkesbury as well as elsewhere - that the leasing of tolls to subscribers became the most frequently used form of raising funds for restoration or rebuilding. Furthermore, where markets had been held by unknown title holders for longer than eleven years, customary law - as a contemporary precedent noted [2] - allowed that leases might be assigned to any 'stranger'. Consequently many 'ownerless' markets and fairs could legitimately be leased by corporations through the crown, an arrangment that no doubt profited both. Of course, the sale of tolls was

[1] Cambs. R.O. Cambridge City Council MSS., Bundle 101. Cf. the case of Wallingford, VCH Berkshire,3, 68.

[2] Precedent document, undated [?1790-?1810], PRO (CL) DL 41/39/59. This precedent opinion in Duchy of Lancaster papers is the only reference found concerning this point of law. Whether it was tested and applied can only be conjectured.

not an entirely novel form of reducing the fixed costs of running local markets - such as the maintenance of markets in good order.

However, as we shall see from the evidence of lease and assignment arrangements themselves, toll selling probably provided the town corporation with an opportunity to reduce the transaction costs associated with market exchange in an era of changing regulatory practice.

The specification of the rights of collectors of markets tolls through leases was obviously important for the market committees of town councils, not least because the transaction cost internalising effect of leasing market tolls for rent farming by others would only be efficient if the specification costs of the contractual arrangements were designed to be lower than all existing transaction costs. The higher the specification and supervision cost of 'contracting-out' market tolls the less efficient the market would be. Indeed much of the effort directed toward designing lease contracts for markets during this period was devoted to ensuring that neither supervision nor specification costs would be excessive. One way in which this might be achieved was by writing leases in such a way as to make lessees self-regulatory and self-supervisory, requiring in other words that they observe strict rules about which there could be no dispute. Some conditions for these lease documents were perhaps identical with those in other leases and were not particular to market lease arrangements. With the assignment of the Sunday market tolls at Bridport in 1826, for example, the new owner of the market tolls was required to observe covenants to 'deliver up the peaceable and quiet possession of the said Tolls hereby granted and

also...the Toll-gatherers box...' at the end of the lease [1].

Nevertheless the often less than generous terms devised by some town councils indicates that it was their intention to do much more than to establish terms for entry and exit to a profitable leasehold property. In a number of market leases of the latter half of the period under examination more wide ranging covenanted responsibilities appear to have been envisaged. An example of such wide ranging toll-lease covenant arrangements comes from Kingston-upon-Thames, where the draft of a lease prepared in 1836 required the potential lessee to pay for 'all sufficient and necessary Stalls, Shambles, Tressels, Boards etc. and fixtures for the use and accomadation [sic] of traders'; further, he had to agree to 'Take care to keep the Pitching and Paving of that part of the Market Place where the fair and Market are held in good [?order]' [2]. These fixed costs are, of course, not a part of the generalised transaction cost element of market maintenance; but they do represent a significant abrogation of council responsibility for local services, like paving and stall arrangement and a concern with the reduction in the supervision costs associated with the maintenance of physical property. However in several toll-lettings in the course of the late eighteenth and early nineteenth century conditional covenants transferred the costs of supervision and even measurement to toll

[1] Indenture of assignment of tolls to Thomas White for Sunday market, Bridport, 1826, Dorset R.O. B3/050 fol. 2. On the regulation of Sunday tolls in general, see Times 10 May 1814, 12 May 1814.

[2] Draft of lease for the market tolls, Kingston-upon-Thames, 1836, Surrey R.O. KB 19/4/38 (3). These rules were later echoed in printed orders of the Corporation, see KB 19/1/1. Cf. Brynmor Pierce Jones From Elizabeth to Victoria. The Government of Newport (Mon.) 1550-1850 (Newport, 1957), 149.

lessees. In Devizes, for example, tolls for the cheese market carried responsibility for inspection of the weighing the product before sale [1] and a not insubstantial number of toll lettings featured similar covenanted responsibilities which would otherwise have been regarded as a part of the duties of the council under the supporting market charter or Act. Apart from those leases already mentioned,the covenanting of responsibilities for the management of exchange in the market area appears in the lease of market tolls at Wallingford dated 1819 [2], the lease of piccage and stallage tolls at Evesham in 1822 [3], Banbury's lease for similar rights in 1834 [4], the lease of the market site and all associated rights made by the Corporation of Rye [5] and the early nineteenth century toll leases of Leighton Buzzard in Bedfordshire [6]. It is not clear from the evidence of the surviving market leases alone, however, when lease covenants for the partial or absolute transfer of management responsibilities became common in southern England. In Bildeston in Suffolk, for example, the covenanted reponsibilities described on leasing the market along with other rights in 1765 did include some deal of supervision and the maintenance of regular

[1] Waylen Chronicles of The Devizes, 206.

[2] Berks. R.O. W/TLt 1-11.

[3] Worcs. R.O. 7123/8/1.

[4] Oxford R.O. BB XXIX/i 1-2.

[5] Sussex R.O. (L), Rye Corporation MSS. 121 /1-3 .

[6] Beds. R.O. KK. 320-3 (1 bundle, piece numbers not given).

policing of market transactions [1]. In the main however lease evidence does suggest that, as in the case of covenants for agricultural tenure, the early nineteenth century rather than the late eighteenth century was the period in which the lease specification of market rights became most common and most essential and that more of the leases of toll written in the 1820's and 1830's specified the exact administrative requirements of lessees than in any other part of the period with which we are concerned.

Obvious advantages were to be gained by creating this class of independent toll owners or prescription holders in addition to any reductions in aggregate specification cost - advantages which become apparent after examining the circumstances under which public market regulation was undertaken. In the town of Chichester, a not untypical market town of the period, toll collection rested in the hands of the corporation well into the nineteenth century. Consequently they had to undertake to pay the costs and salary of a toll collector. This could impose significant and rising costs upon a small council, costs which, moreover, were required to be paid as part of the charter responsibilities of the council. Chichester - a not over-conscientious authority - employed only two men from 1796 for '...putting out the market wattles and collecting the market dues' at ten pounds each [2] but only reduced this burden after the passing of the market act for a new market house in 1808; thereafter two toll collectors

[1] Suffolk R.O. (I) HA 61/436/247.

[2] Francis W. Steer (ed.) Minute Book of the Common Council of the City of Chichester 1783-1826 Sussex Record Society volume 62 (Lewes,1962), 48, entry for 9 June 1796; idem. The Market House, Chichester (Chichester, 1962), 7. Cf. Brynmor Pierce Jones Elizabeth to Victoria, 39,72.

were employed at five pounds each [1]. The advantage of farming out tolls, however, came from much more than the expenditure saved upon salaries. Subcontracting tolls might actually increase trade. In Dartford the advantages of leasing toll prescription were plain to John Dunkin in 1844:

> The Market-house and shambles continued to exist in their original situation till 1769, when having been long found most incommodious to the thoroughfare and trade of the town, pursuant to an arrangement with the feofees of the Grammar school, they were removed to their present situation; the farmers however continued to assemble in the High-Street as heretofore, but the practice of selling corn by sample having ultimately entirely superseded bringing it in sacks to market, the space below the Market-house gradually became unoccupied and at the close of the last French War the market place was nearly deserted by hucksters, butchers etc., when Mr. William Lucas who rented the tolls, with difficulty persuaded some tradesmen from London to bring down their goods. They succeeded, and he enclosed the hucksters' stalls for their use. One tradesman brought another and the market so much increased, that Mr Pearce, finding the space too small, accommodated them with stalls in the High Street, which from its thoroughfare everyone seemed to prefer, insomuch that at last the new market-place in the feofee's yard became deserted; and the traders again took their station on the ancient site [2].

Pearce appears to have made some considerable efforts to maintain and even develop his investment in the market toll rights; it appears inconceivable that the part-time salaried cryer and his assistant at Chichester would have had any incentive to undertake the same market expansion. Indeed, their duties would ultimately have included fining traders who strayed from the charter site for the market. At Dartford the persuasive Mr Pearce brought traders back to a market site with the promise of better facilities and access.

[1] Steer (ed.) Minute Book, 99, entry for 21 February 1809. In some instances it proved apparently economical to allow certain individuals to take some portion of toll in lieu of salary, as at Salisbury (Wilts. R.O. G/23/1/34, entry for 14 July 1824) and at Wokingham (VCH Berks..3. 227). This practice does not appear to have been widespread however.

[2] John Dunkin The History and Antiquities of Dartford with Topographical Notices of the Neighbourhood (London,1844), 252-53.

When leasing proved to be less attractive to subscribers, more general forms of funding had to be found and, in some few cases, an annuity or tontine was issued to fund the building of the new market. The tontine, a favourite means of raising capital in the eighteenth century, reduced the risk of investing in projects like new markets by operating a sinking fund of capital in which default of payment or decease increased returns for survivors and non-defaulters. For smaller investors who at the same time wanted an investment opportunity and a means of improving their own environment, the tontine offered a way of accomplishing both; for town councils, of course, the tontine was an ideal solution. Self-management by members of the tontine reduced the costs of organising capital finance, and allowed the council to concentrate upon more important and routine payments. At Plymouth, for example, the tontine issue of a few hundred pounds succeeded where an attempt at leasing had previously failed [1] and when Gloucester's traders and farmers reported themselves to be in need of a new site for market, the corporation had a survey drawn up of the Fleece

[1] John Beckerlegge 'Four Hundred Years of Municipal Finance' Annual Reports and Transactions of the Plymouth Institution 17, 1928/9 - 1935/6, 255. Contemporary Plymouthians seem to have been willing to augment the fund at intervals, Times 9 January 1823. Precisely when tontines and other forms of mutual fund were replaced by share issues as a form of raising capital is difficult to discern. Only three of the 624 companies floated in the equity markets in 1824-5 were market companies, and these together with the so-called 'provisions companies' also floated at the time, represented a mere 2.25% of the total equity capital raised; over four-fifths of these companies were, in turn, created for and located in London (Henry English A Complete View of the Joint Stock Companies formed during the Years 1824 and 1825; being six hundred and twenty four in number (London, 1827), 29). By comparison, the number of market companies founded in the 1850's through share issue suggests that this properly belongs to the age of Victorian civic reform rather than to the late Georgian age. See, for example, the experience of Crewe in W.H. Chaloner The Social and Economic Development of Crewe, 1780-1923 (Manchester, 1950), pp.85ff. and notes below.

Inn in the city '...to see whether the same can be converted into a commodious Market Place'[1]. After deciding instead to take premises for the market in the city's Eastgate Street in 1783, some £4000 was raised through a tontine to pay for the new building [2].

All of the alternative forms of ownership discussed (by transfer of prescription, lease of tolls or subscription to either a purchasing federation or a plan to take over toll-gathering made up of a local consortium) produced entirely different forms of organising institution from the market court or committee. It is logical to infer that, because these forms of organisation could now meet the considerable transaction costs associated with market exchange, they were indeed more efficient institutions. The evidence is however more equivocal and several points should be born in mind in appraising the relative efficiency of these alternative forms of ownership and control. First, the subscription 'clubs' which purchased markets or market rights were legally restricted in the policing and control they had to undertake. Unlike the market or mayoralty courts they were not required (indeed were not, as private citizens, allowed) to enforce obedience to their own prescriptive rights save through the courts. Whilst eighteenth century councils had effectively prevented market users from bypassing their corporations' market rights by excluding offenders from their rights as private citizens (at Gloucester those who avoided toll payment to the corporation had to show cause why they should not lose their franchise and in the town of Hertford only freemen were

[1] Order for survey of the Fleece Inn, Gloucester, 1778, Corporation Minute Book, Glouc. R.O. Gloucester Corporation MSS. B 3/11 fol. 226.

[2] ibid. B3/11 fol. 357; B3/12 fol. 31.

given access to markets from 1773 [1]), the new types of organisation could not exercise direct influence over consumers and stall holders through similar sanctions. Their ultimate sanction was, of course, to remove stalls or close or remove the market. More frequently, no doubt, subscribers committees or representatives urged that transgressors should be punished by the courts or by notice to the common council of the town. In one of the few surviving minute books of a committee of subscribers, from Arundel's corn market for the period after the sale to subscribers in 1833, not infrequent refemals of cases are made to the town council in

[1] Orders of Common Council, Borough of Hertford MSS. Volume 5, Herts. R.O. fol. 290v, entry for 30 December 1773; Order respecting preventing toll-taking, Gloucester, 1779, Corporation Minute Book, Gloucs. R.O. Gloucester Corporation MSS. B 3/11 fol. 245. A later account suggests that the decision to prohibit non-freemen from marketing in Hertford caused 'considerable litigation at the time...' although no evidence has been uncovered of this in the higher courts ('RC on Markets...', 2, 119). Other examples of summary restrictions upon who could buy and sell in the market can be found in 'Order respecting Tolls at Dunstable', 1814, Beds. R.O. P72/28/12; 'Proceedings of the Committee appointed by the Corporation of Salisbury', 1817-49, Wilts. R.O. G/23/1/34, entry for 12 May 1822; John Boys A General View of the Agriculture of the County of Kent (London,1796), 172 and Felix Hull (ed.) A Calendar of the White and Black Books of the Cinque Ports, 1432-1955 (London,1966), 562-3 but in only one of these instances (at Hastings) did councils seek to restrict market entry to 'freemen' only. These rules for the use of the market should be distinguished from more general municipal legislation of the town councils throughout the period which sought to prevent hawkers and pedlars from taking advantage of the market without paying toll. See, among the many accounts of meetings raised by or on behalf of market traders themselves for the supression of the hawking trade during the market, Huntingdonshire,Bedfordshire,Cambridgeshire and Peterborough Gazette 27 July 1816, 6 June 1818; Felix Farley's Bristol Journal 6 February 1790; Annual Register 56, 1813, 102.

hopes of retribution [1]. The second source of the relative efficiency of subscription schemes or purchasing consortia resulted from the pedestrian observation made earlier in this essay that small groups of individuals with capital investment in price-regulated institutions have lower incentive costs to police fraudulent behaviour; in other words, responsibility for policing and detection of evasion now rested with those few people with a personal incentive to detect wrongdoing. Consequently these new forms of organisation associated with newly transferred property rights in markets (seemingly half way between organised firms and representative councils) were, in the true sense of the word,more economical.

Of course rural market traders were not entirely unfamiliar with the introduction of hierarchical forms in market organisation having themselves been threatened by the attempt to substitute regulated shops for markets in the years of the most significant price rises of the war years. The 'parochial shops' founded in the 1790's were an immediate solution to the

[1] Minute books of subscribers meeting, Arundel corn market, 1833-1923, Messrs. Holmes, Campbell and Co. (Solicitors), Arundel. My thanks are due to Mrs. Gill, Archivist of West Sussex Record Office, for making available photocopies of this very rare and (in 1984) undeposited item. There exist only two archival collections relating to nineteenth century southern English provincial market companies - those for the Ashford and Rye Cattle market companies (Lesley Richmond Company Archives: The Survey of the Records of 1000 of the First Registered Companies in England and Wales (Aldershot,1986), pp.2, 10) - although some earlier urban market company records survive in county and borough collections, for example those used by Barber in his study of Leeds (Brian Barber 'Municipal government in Leeds, 1835-1914' in Derek Fraser (ed) Municipal Reform and the Industrial City (Leicester,1982), 82), the records of the Market company established in Newport (Brynmor Pierce Jones Elizabeth to Victoria, 148) and the records of the various London market companies surveyed by Webb in 1891 are all still extant (Sidney Webb The London Programme (London,1891), Chp. 6).

pressing problem of feeding the population in times of dearth (the first recorded parochial shops were opened in 1794 [1]) but began as charitable solutions to the short term problem of relieving the pressure of want from the local poor population. This charity usually took the form of extended credit facilities of one kind or another [2] but soon developed the characteristics of firm type hierarchies of internal allocative functioning - that is to say, these parochial shops soon developed their own methods of procuring stock, producing finished products and selling to customers. What the parochial shop movement - for such it was proclaimed to be [3] - offered was a rational solution to the problem of market misallocation by the humanitarian rationing of community credit, a feature which was seldom evident in the best run markets communities of the rural south; yet for our purposes the most significant feature of these ad hoc arrangements for emergency provisioning was the presence of very similar structural snd operational characteristics to those associated with the decentralised, privatised market or the nineteenth century firm. The Reverend Glasse's

[1] David Macpherson Annals of Commerce (London,1805), volume 4, 461.

[2] e.g. M.F. Davies Life in an English Village: An economic and historical survey of the parish of Corsley in Wiltshire (London,1909), 77-78; Bishop of Durham 'Extract from an Account of a Village Shop at Mongewell in the county of Oxford' Reports of the Society for Bettering the Condition and Increasing the Comforts of the Poor 1, (1803), 13-20; Annual Register 51, (1807), 867; John Vancouver An Enquiry into the Causes and Production of Poverty, and the State of the Poor, Together with the Proposed Means for their Effectual Relief (London, 1796), 23, note.

[3] Thomas Bernard 'Extract from an account of what is doing to prevent scarcity, and to restore plenty in this country; with observations' Reports of the Society for Bettering the Condition and Increasing the Comforts of the Poor, 3 (1801), 60-61. The earlier 'box-clubs' were more nearly charitable enterprises relying on the generosity of local gentry for support (see, for example, the description in Gentleman's Magazine. 60 (1790), 591).

shop at Greenford in Middlesex, for example, procured stocks locally, set rigid opening times and provided tickets for the use of the shop by the poor in lieu of price or quantity rationing. By controlling the allocative process, Glasse reasoned, the opportunity for market traders to engineer a monopolistic control over their customers and the shirking of legal responsibilities for the observance of weights and measures laws was reduced [1]; equally a certain economy in transaction costs may be inferred through which more efficient - and not to say safer - forms of market transaction were probable. Neverthless the internal or organisational control of market provision was less frequently conducted through such temporary shops than through the new market subscription clubs, whose functions also included the fixing of sufficient capital for refurbishment and market improvement as well as determining the rules for the functioning of the market. The simultaneous appearance of the new private committees and the parochial shop movement should nevertheless be recognized as more than a coincidence.

Naturally, improvement of any kind cost money and however it was arranged, whether through lease, tontine or sale, market title holders including corporations did their best to reduce the costs of repair and refurbishment. Some improvement might be made using existing buildings and adapting them to the needs of the trading community; in particular other public buildings could be used to provide accommodation for farmers' and factors' stocks. Places of entertainment and worship, for example, often proved to offer more space for market trading. In Bury St. Edmunds,

[1] Revd. Dr. Glasse 'Extract from an account of a village shop at Greenford, in Middlesex' ibid., 55-58.

Ringwood in Hampshire and at Lincoln the theatres of the town, usually owned not by private individuals but by the corporation or council, were made to provide facilities of one variety or another for the market [1]. It is by no means certain that all newly built places of entertainment were intended to have such a dual function; indeed the one hundred or so theatres built in provincial England during the reigns of the last two Georges were funded by subscription schemes which must have vied with those of the market authorities for local capital for market improvement [2]. Where unused churches or chapels were available they too were mobilised to help manage the overflow from growing markets but were naturally never designed with this use in mind. When the market at Poole expanded in 1827 to the Unitarian meeting house, the move was intended to offer a short term and very imperfect solution to the problem of finding more space for traders [3]. Another, perhaps more natural solution, was to sell off those parts of the fabric of the market which appeared most in need of removal to suitable buyers; in this way a number of southern English market towns managed to rid themselves of the physical problem of market dilapidation noted earlier whilst also raising funds. Here, however, it was

[1] Bury St. Edmunds Corporation Journal, 1769-1834, Suffolk R.O. (B) D4/1/4 fol. 32, entry for 6 June 1774 ; George Lipscombe A Journey into Cornwall Through the Counties of Southampton, Wilts., Dorset and Somerset and Devon (Warwick,1799), 50; Robert Mudie Hampshire Its Present and Past Condition (Winchester, 1838), 151; T. H. Allen The History of the County of Lincoln from the earliest period to the present time (London,1834), 204.

[2] C. W. Chalkin 'Capital Expenditure on Building for Cultural Purposes in Provincial England, 1730-1830' Business History, 22 (1980), 54.

[3] John Sydenham The History of the Town and County of Poole (Poole,1839), 434. (By 1833, a correspondent to the Times was complaining of the frequency with which shops and other commercial premises were attaching themselves to churches, Times 1 January 1833).

the intervention of individuals rather than subscription clubs that offered relief. At Southwold in Suffolk, the old 'market hall' - really a covered market cross of octagonal dimensions - was taken down and sold in 1809 for a mere £39 [1] whilst at Sandwich in Kent plans to build a new market in 1795 were partially funded by the sale by auction of the Crosshouse (again, the market cross of the old market) [2]. The premium upon space in all such cases added urgency to these sales and no doubt eased congestion at both Southwold and Sandwich as at other towns.

Similarly many boroughs planned to make room for traders under, or inside, other public buildings and in many corporations the building plans for a new town hall included market accomadation or space under the portals of the new municipal offices for the traders [3]. At least three shire buildings were used for the purpose of providing space for corn marketing, either under the entrance pillars or near the dry side of the building; and in Launceston, Bodmin and Warminster it must be supposed that even if these facilities did not prove to be adequate they were inexpensive [4]; and when the council of Gravesend erected a new Town Hall in 1764 convenience

[1] Arthur Farquhar Bottomley (ed.) The Southwold Diary of James Maggs, 1818-1876 Volume 1 [Suffolk Records Society volume 25] (Woodbridge, 1983), 25.

[2] Dorothy Gardiner Historic Haven: The Story of Sandwich (Derby,1954), 335. Cf. the case of Liskeard in Cornwall, F.W.L. Stockdale Excursions in the County of Cornwall (London,1824), 149.

[3] Colin Cunningham Victorian and Edwardian Town Halls (London,1981), 3-4.

[4] 'Report of the SC on County Rates...'BPP Sess.1834, 14 (542), pp.297, 300.

dictated that the design included space for the town poultry market [1]. The 'market-and-town-hall' type of construction survived well into the age of opulent civic architecture and preceded the building of the major municipal town halls of the late nineteenth century. Yet despite their size these early attempts to unite the institutions of commerce and political control were costly and only infrequently undertaken without a public subscription for the town hall building. The new courthouse at Croydon, for example, was erected in 1809 and provided space beneath its portals for some part of the corn market; it cost the small town corporation of Croydon £8000 to build [2].

When corporations and councils were forced to fund new building or refurbishment themselves and were either unwilling or unable to raise the requisite funds from subscriptions, other funds were often diverted or local taxation or rates revenue was used to pay for any necessary repairs and maintenance. Over one quarter of the funds needed to build the new market place at Wisbech in Cambridgeshire in 1811 came from the highway rate (a highly dubious financial 'sleight-of-hand' in itself); the remainder came from corporation income and 'unspecified' sources, none of which were connected with any subscription scheme [3]. In Dunstable in Bedfordshire similar switching of funds occurred when the market had to be

[1] G.A. Cooke Topographical and Statistical Description of the County of Kent (London,[?1801]), 235.

[2] Rev. D.W. Garrow The History and Antiquities of Croydon (Croydon, 1818), 191. (This expansion was still apparently insufficient, Times 4 October 1821).

[3] William Watson An Historical Account of the Ancient Town and Port of Wisbech (Wisbech,1827), 296.

repaired and in part rebuilt in 1803. More than forty per cent of the final cost of refurbishment and extension of the market was funded from money made available by local Turnpike trustees presumably as a gift and as part of general improvements to the town [1]. Yet the most incongruous of all of these suspicious forms of funding for market sites occurred in Lincoln. Here the butter market which was established in the early nineteenth century was funded throughout most of its life from monies left over from a fund for the provision of borough feasts [2].

By a variety of methods, then, town councils sought to reduce the costs of transaction associated with market exchange primarily by transfering most of those costs to toll-lessees or buyers thereby funding the extension or repair of their local markets. Whether they used legal or illegal (or morally dubious) means so to do, their actions were governed in the main by the wishes of traders themselves, whose requirements were frequently given as the reason for the auction of tolls or the sale of rights to the market. Yet the precise chronology of the changing structure of property rights in markets cannot be inferred either from the legal record or from the documentary evidence of a few southern English councils alone. The evidence that is available, however, confirms our general hypothesis that councils sought to alienate property rights where the burden of transaction costs

[1] Accounts relating to the rebuilding of Dunstable market, 1803-04, Beds.R.O. R5/955.

[2] T.H. Allen History of the County of Lincoln, 204. Lincoln appears to have been particularly poor in this regard. Following complaints from traders in 1828 asking for better facilities, the corporation merely sought additional powers of regulation through bye-laws. Sir Francis Hill Georgian Lincoln (Cambridge,1966), 214.

became intolerable. Yet the exact chronology of this dispersal of community property rights and the effective 'privatisation' of common property is not immediately clear from the study of the examples of individual towns.

Table 5.4:Legislation and market building in England and Wales by date in samples, 1773-1850, 1801-1840 (percentage distribution).

	[1] Legislation for market regulation	[2] Legislation for new or enlarged and improved facilities	[3] Writs issued in Chancery for new markets	[4] Dated market buildings sample	[5] Column [4] recalculat -ed,1801 -1840 base
pre-1800	-	-	-	30.2	-
1801-10	26.3	23.0	50.0	10.3	19.0
1811-20	22.8	16.0	14.3	11.2	20.7
1821-30	31.6	42.0	28.6	19.8	36.5
1831-40	19.3	16.0	7.1	12.9	23.8
1841-50	-	-	-	13.8	-
1850-	-	-	-	1.7	-

Sources : See Appendix 3.2

Table 5.4 attempts to display leading indicators of the development of property rights in markets during the period with which we are primarily concerned. Column [1] reports the proportion of legislation which sought to amend old obligations or impose new duties upon corporations in relation to market ownership passed in each of four decades ; column [2] similarly represents the proportion of acts for the remodelling of markets or their relocation over the same period. Column [3] represents the issue of new rights for market holders in the form of Chancery writs of inquisition ad

quod damnum, and column [4] shows the number of new market sites and buildings recorded in each year in several major topographical works throught the period 1773 to 1850. The final column converts the market buildings sample into a shorter period sample compatible with the legislation and writs issue samples by recalculating all of the relevant subperiod samples.

The evidence of Table 5.4 suggests an interesting chronological sequence of circumstances which largely agrees with the evidence gathered from the leases studied earlier and with the transaction costs approach taken in this essay. What becomes apparent immediately is that the largest proportion of writs, acts for regulation and improvement and new market buildings all occurred during post-war depression years of the 1820's. Whilst contemporary opinion supposed that most of the effect of the long cycle depression of 1815-32 was absorbed by the agricultural sector, marketing appears to have boomed. One explanation of this phenomenon, in line with the evidence of the growth of the use of specific toll lease covenants, is that the growth of regulatory legislation specifying the responsibility of existing owners in the first and second decades of the nineteenth century accompanied the growth of new rights in markets acquired autonomously. New responsibilities, in other words, were given to new owners of markets. Sales of rights in markets fell during the first years of the post-war depression but picked up again thereafter. In the second wave of newly created rights to markets in the 1820's, however, the influence of new corporate owners (subscribers and purchasers) is evident; only they could observe the necessary regulatory and policing needs of the

market, and recognized their responsibility to pay the transaction costs of market exchange in the lease documents they signed locally and in the market acts which passed control of the market to them.

From the 1820's Parliamentary legislation rather than writs appear to have been used to transfer both rights and attendant transaction costs to the new owners precisely because of the need to ensure that the specification costs of market assignment remained lower than the transaction costs of the untransferred market property. Whilst 22 market titles were transferred by writ before 1820, only six were transferred through Chancery between 1820 and 1841 [1]. In the mid-Victorian decades further centralisation further promoted the devolution of rights, though later the strict intention was to create the conditions for corporate control with little opportunity for subcontracting services in control and surveillance. What is apparent from the record of government legislation before 1837, however, is that little effort was expended to enhance the trend toward parliamentary supervision of ownership. Thus whilst the Municipal Corporations Act of 1835 itself had little direct effect upon the building of new markets, it did permit corporate owners to extend the extent of their market to accord with the

[1] PRO (CL) C.202/161/24 - C.202/230/29. The incomplete listings in the London Gazette (from 1811) must be supplemented by reference to the Chancery papers and Local & Private Acts in order to form a complete picture of the process. Some markets appear in only one list (for example, writs for Poplar and Herne Bay appeared in the London Gazette - 31 March 1835 and 25 May 1841 respectively - but not in the surviving writs) and some earlier writs issued before sherrifs (e.g. London Gazette 2 January 1813) do not appear in either the Chancery writ collections at Chancery Lane or the Acts of Parliament passed for the purpose. One extraneous piece, a grant from 1791, is in PRO D.L.41/46. All of these materials have been consulted in preparing the data on writs in the above table.

new boundaries designated by the Act [1]; this was in fact little more than an administrative convenience. Rather it was later, Victorian, social administration that achieved the coordination of market law and practise. Surveying the English market systems in 1910, the Office of the American Consul in London commented upon the effect of this Victorian legislation with an uncommon retrospective perceptiveness.

> The passing of the local government act of 1858 may be said to have inaugurated a new era in the history of markets, since it gave to local authorities, elsewhere than in London, conditional powers to establish markets. Before this however, the markets and fairs clauses act, 1847, had formulated a scheme for the establishment and regulation of markets, but its application was limited to those cases where its provisions should subsequently be incorporated into an act of Parliament. Some of the clauses of the act of 1847 were subsequently incorporated in the local government act, 1858, and afterwards in the public health act, 1875 [2].

What the 1847 Act offered was a statutory right for councils and corporations to effect and support the creation of private rights, whereas the 1858 Act created the conditions under which local authorities might eventually take control of those private rights. The 1858 Act sounded the end of the extension of private rights and properly belongs to the earliest period of Victorian municipalisation in country and city. This pattern is similarly consistent with the argument that the specification costs of market rights assignment were critical in determining the need, first for new forms of property transfer, then for new forms of supporting institution for market society. At the zenith of nineteenth century industrial capitalism, then, the state - the ultimate guarantor of private rights and certainly the least costly - created and enforced these private

[1] 5 & 6 Will. IV c. 76 ss. 7,8, Schedules A and B [Part 1].

[2] U.S. Department of Commerce and Labor, Bureau of Manufactures Municipal Markets and Slaughterhouses in Europe Special Consular Reports volume 42 , number 3 (Washington,1910), 65.

and communal rights in private property. This transformation of market property rights from private feudal rights to corporate obligations and thence to private and often communal private property, can be explained in terms of the attempted reductions in transaction costs achieved by each successive change in the controlling organisational form. As the organisational form of market control became transmogrified so too the need for hierarchical internal organisation increased. As market ownership became a popular form of communal property ownership through subscription schemes and other forms of 'shareholding', declining market forms increasingly came to resemble modern firms - not only in ownership and control but also in internal structure. With the disintegration of private, feudal, ownership the orderliness of markets came belatedly to mimic the rational market of the classical economists' textbooks. Only from the 1830's did it become possible to reorganise markets on the scale demanded by atomistic capitalism. When in 1834 the Liverpool market committee decided that, instead of allowing market trade to spread into neighbouring streets, they should remodel the site they decided on principle '...to send the market to the inhabitants...[rather] than to bring the inhabitants from a great distance to the market' [1].

The new organisation of market economy achieved in the course of this process produced a new style of market architecture as well. With plentiful

[1] J.A.P. 'A short account of St. John's Market, Great Charlotte Street, Liverpool with some notice of other Markets in that Town' Architectural Magazine. 2 (1835), 130. In 1822, the corporation of Liverpool had undertaken the first stage of market refurbishment by building a market hall of 1100 feet by 200 feet, J.H. Clapham Economic History of Britain. volume 1, 226; Brian D. White A History of the Corporation of Liverpool, 1835-1914 (Liverpool, 1951), 6.

capital, corporations and subscription committees engineered the significant remodelling of the larger markets and some of the smaller. Pioneered by George Dymond, Charles Fowler and others the new architecture of the provincial market was to follow very closely the practical guidance of the Liverpool market. As one contemporary observer of the new architecture of markets observed in 1834:

> It is worthy of remark that the advantages derivable from the concentration of business which takes place in markets and the facilities which they afford to purchasers and vendors by giving to the former the opportunity of procuring commodities at the cheapest rate, and to the latter the convenience of more readily disposing of their goods, should until now have been appreciated in a greater degree in all countries on the Continent than in Great Britain [1].

The new architecture - examples of which included the new markets at Exeter (1835), Hungerford in London (1834) and Covent Garden (1830) - sought to make access easy and space for trade plentiful. Traders were themselves consulted, not as owners but as users of the property of others. In an attempt to draw market traders to the new market at Exeter, for example, George Dymond sought the views of the users of the old market and, afterwards, installed moveable stalls, a fountain near the fish stalls to keep the fresh produce cool and marble slabs for cutting the fish for

[1] J. Robertson 'A Descriptive Account, accompanied by plans, Elevations and sections, of Hungerford New market recently built from the Designs of Charles Fowler Esquire, Architect' Architectural Magazine 1, 1834, 53-54. Compare this with the reserved judgement of 'Taste, as Displayed in the London Markets' Surveyor, Engineer & Architect 1, (1840), 273-76. On Fowler's contribution to the redesign on urban markets, on the recognized revolutionary design of the covered market at Tavistock and the new architecture of markets in general, see Jeremy Taylor 'Charles Fowler: Master of Markets' Architectural Review 135, (1964), 174-182; idem. 'Charles Fowler (1792-1867): a centenary memoir' Architectural History 11, (1968), 57-74.

eventual customers [1]. Even humble market crosses - once berated by Marshall for their inconvenience - became at once more grandiose and classically ornate and more functional [2] and, after Derby introduced gas lighting in the market in 1821 [3], others similarly illuminated their traders in order to improve market conditions. This seemingly minor revolution might not have been possible had not market ownership changed in character over the previous half century. Indeed, in each of the cases of architectural improvement noted above, it was a private subscription club or market company that directed the design or demanded the improvements provided.

The physical remains of the late Georgian and early Victorian markets are in reality symbols of the effectiveness of the more enduring changes that took place in market organisation and the control of market rights after 1780. The transition from the small cramped conditions of the provincial markets of the major market towns characteristic of the earlier period to the grand and elegant market designs of the Victorian architects might certainly be explained in terms of the growth of investment and capital in market equipment as a result of general, macroeconomic, circumstances. However, we are forced to ask both who invested in the markets of the rural south and why they did so during the period and only one answer appears to

[1] George Dymond 'Description, Plan, Elevation, Sections and Specifications of the Exeter Higher Market' Architectural Magazine, 3 (1836), 12-30.

[2] Hugh Braun A Short History of English Architecture (London,1978), 158; John Brushe 'An unpublished design by William Thomas for the Market Cross, Mountsorrel' Burlington Magazine, 119 (1977), 36.

[3] Times 26 February 1821.

satisfy the evidence of the large number of towns surveyed above. Once town market sites had been freed from feudal rights of ownership and effectively transferred to private hands was refurbishment, redesign and redecoration and improvement made possible; only through the reassignment of rights in markets were the conditions for subsequent improvments in market trading conditions possible and transaction costs incidentally reduced. As with most private good transaction technologies, markets benefited their customers by virtue of these developments and secondary reductions in the transaction costs incurred in the course of trade, such as those observed above, may further have increased the efficiency of the market system. Seldom is the 'privatisation' of public rights entirely successful for reasons intimated earlier; in relation to the provincial market, however, the process appears to have been a consummate success.

This interpretation of the evolution of the Georgian market as an institution is, of course, somewhat at variance with that offered by certain other social and economic historians of the rural institutions of late eighteenth century England. Following Edward Thompson [1], many have argued that the institutions of landed and capitalist property came in the course of the eighteenth century to dominate the traditional forms of

[1] See particularly E.P. Thompson The Making of the English Working Class [second edition] (Harmondsworth,1968), 246ff.; idem. Whigs and Hunters (London,1975) passim.; idem. 'The moral economy of the English crowd' Past and Present 50, (1971), 76-136; idem. 'Patrician society, plebian culture' Journal of Social History 7, (1973), 382-405. On this view of the relationship between property rights and the popular conception of traditional sanctions within the framework of the market, see Peter Burke 'Revolution in Popular Culture' in Roy Porter and Mikulas Teich (eds) Revolution in History (Cambridge, 1986), 210-11 and Douglas Hay 'The criminal prosecution in England and its historians' Modern Law Review, 47 (1984), 12-14.

market allocation; that the 'moral economy' of the eighteenth century crowd, the popular opposition to the excessively punitive game laws, and the reassertion of community sanctions in the course of the revolutionary era amounted to a reactionary populist demand for freer and fairer market conditions in which monopoly would be eradicated. The interpretation of the history of the institution of the market offered here requires less support from the evidence of the violent, the political and the mystically traditional behaviour of 'the crowd'. In fact the 'traditional sanctions' gradually being eroded in the course of the reign of George III - the gradual disappearance of the appeal to what Thompson and others evidently regard as an Elizabethan 'golden age' of market regulation by customary law - did not actually vanish from the rural world ; they were merely taken up by private individuals whose own interests determined the performance of market institutions in succeeding years. This constituted not so much what Harold Perkin regarded as a professionalisation of the market [1] as a transitional phase in the evolution of economic institutions from being the means of the controlled exchange of collective property to the private vehicle for restricted transactions. The regulation of markets passed into the hands of private individuals, 'property owners' rather than managers of a distinctive kind. With the passing of feudal controls, feudal obligations too passed away and property rights in markets became vested in the hands of those most interested in their exercise - the traders themselves. To what extent this revolution in the structure of ownership caused or affected the organisational and structural changes in the operation of the market we have witnessed requires much more detailed research than is

[1] Harold Perkin The Origins of Modern English Society, 1780-1880 (London,1969), 118.

possible on the small canvass allowed here; but, as has been indicated in this chapter, it does appear that substantial changes in both ownership and structure occurred with the probable effect of reducing transaction costs in rural markets.

How far is the experience of the eighteenth and nineteenth century provincial market consistent with alternative accounts of the evolution of economic structure ? In this chapter, we have seen that the creation of private prescriptive rights, often because of the need for capital for market refurbishment, led directly to the formation of private associations or subscription clubs which, in the course of time, became the better known market companies which emerged in the second quarter of the nineteenth century. The motivation for the formation of these companies was, in the first instance, no different from that which prompted the previous generation to devise local subscription schemes, and the arguments used in support of the formation of local companies - and later joint stock enterprises which reached flotation within years - were remarkably the same as those used in the promotion of subscription schemes. In one town '...there was a feeling generally throughout the town of that kind which prompted people to arouse themselves and say that something ought to be done, and they formed the Company...' in 1832 [1]. Giving evidence to a late nineteenth century Royal Commission on Market Rights, those who had been involved it its creation some fifty years earlier recalled, with some evident surprise given the later history of the Company, that it had originally been created merely to purchase the property of an old and ill

[1] 'RC on Markets...', 3, 20-21. Cf. note 89 above.

appointed market square; it had become a major local employer and a source of considerable local pride almost to the surprise of those who had been present at the inception of the scheme [1]. Yet there were plainly differences between early Georgian subscription clubs and later, Victorian, market companies. Subscribers, tontine holders and members of market toll 'clubs' bought not only the rights to take toll but often had to take on the responsibility (or part of the responsibility) for the administration of markets and the punishment of offenders - and this internalising function appears to have been of benefit to corporate owners of market sites and rights as well as to the community as a whole. The internalisation of function associated with this transfer of prescriptive rights was accompanied by the creation of alternative internal hiererachical arrangements for the administration of these newly acquired rights so that, by the time the early market companies were established in the larger cities of Britain in the 1830's and 1840's, a framework for control and administration already existed. We have further suggested that the attempt to reduce the transaction costs associated with market operation was primarily responsible for this chain of events in the evolution of market organisation.

Recognition that market ventures of this type did not fully internalise the transaction costs associated with exchange, however, suggests that some residual advantage lay in their continued externalisation. Indeed we might assert that in the early stages of the transition from market- to firm-type organisation competition was weak enough to require that regulatory powers

[1] 'R.C. on Markets...', 3, 15.

had to rest with councils and local authorities who, after all, still owned markets in all other senses. Toll holders and subscribers did not merely acquiesce in this state of affairs, they positively gained from it. As we have seen rudimentary attempts were made to assign some of the functions of the market committee to the subscribers and tontine holders through covenants, but substantial powers for the detention, trial and punishment of offenders still rested with councils because of the demands of contemporary administrative law. Even through the improvement acts of parliament self regulation by appointees of the council was not encouraged. Equally it should be remembered that councils themselves secured an advantage through toll rights sale or toll-farming for transaction costs were reduced in the market. Perhaps the clearest message of this account of the development of alternative forms of organisation to the nineteenth century firm has been that we are simply unclear as to the role of market processes in the creation of the internally structured hierarchy of the firm and that the need for a business history of the market is as great as the need for a thorough business history of firm-type organisation.

What was remarkable about this episode in the economic history of the market economy was not that the assignment of toll rights took place (toll farming itself had long existed in England) but that new forms of organisation emerged to exploit the opportunity by reducing transaction costs through their partial internalisation. This first sign of the creation of internally structured firm-type hierarchies in elementary markets forshadowed the development of the vertically integrated wholesale firm of the nineteenth century and, possibly, the mid-century joint stock

company. By the 1850's indeed the development of market institutions and of firms were moving in parallel: the 1855 Act that created the conditions in which the joint stock limited liability company of the later nineteenth century thrived was followed a little later, in 1858, by the Local Government Act which created the right for local councils to create markets and lease them or hire them as appropriate. In both cases, it may be argued, the hand of Dicey's 'state communalism' affected the form of organisation created through the allocation of private rights over the previous half century or more, and the corporations and municipal markets of the late nineteenth century threw off their older heritage.

CHAPTER SIX: THE 'REVOLUTION IN CONTRACT' AND ELEMENTARY EXCHANGE.

> 'In no human transactions, not even in the simplest and clearest, does it follow that a thing is fit to be done now because it was fit to be done sixty years ago.' [John Stuart Mill, 1848]

Economic historians only very occasionally pay attention to the evolution of the rules that governed the economic behaviour of men and women in past time. The historical evolution of those legal rules which protect and guarantee personal freedoms and yet also limit action in pursuit of personal or social satisfaction has been viewed as part of an older, less rigorous, institutionalist account of economic history and little of the older genre of economic history associated with the British economic historians of the latter half of the nineteenth century (Ashley, Cunningham and even Thorold Rogers, for example) now influences the writing of economic historians working today. The traditional themes of the economic historiography of the 1890's - the rise of guilds against the traditional individualism of English society; the decline of the feudal 'servus' as a result of purely economic factors affecting the landholders of medieval England; the emergence of capital as a 'category' in the economic life of early modern England and the decline of usury; the development of the town as the fundamental unit of economic life; and the development of laissez-faire doctrines in response to the spur of commerce - all tell of the rise of nineteenth century progressive individualism and its emergence from pre-industrial communalism. Well into the present century the themes of individualism and the social impact of capital guided the research and writing of historians in the field of legal-economic evolution. Yet the final success of the neoclassical paradigm in economics checked the

development of what had become, by 1939, the dominant form of legal-economic history written by historians. From the earliest years of the century institutionalist legal economic analysts of one variety or another had offered a contrary interpretation to that of both the generic neoclassical legal economics and the historical economists' legal-economic account of the evolution of modern forms of ownership and control. Even institutionalist economists began to adopt similar methods in pursuit of the study of economic evolution and it was John Commons who principally directed the monumental American legal and labour history researches of this new genre of legal-economic history [1]. In recent years, however, this approach, too, has come under attack and the writing of almost any conceivable variety of legal-economic history is now thought to require at least an apology or justification [2]. Unhappily perhaps part of the reason for this has been that the most important themes in recent legal economic historiography have required - as will be the case here - a substantial understanding of the principles and thereby the practise of the common law in England.

In this chapter we shall see that new institutionalist explanations of historical legal evolution associated in recent years with a critique of

* See the note on legal citation in the prefatory notes to this essay for details of the practices observed in this chapter with regard to case identification.

[1]John R. Commons Myself: the Autobiography of John R. Commons (Wisconsin, 1964), 143; idem. Legal Foundations of Capitalism (Madison, Milwaukee and London,1968).

[2] G.R.Rubin and David Sugarman (eds.) Law, Economy and Society, 1750-1914: Essays in the History of English Law (Abingdon,1984), 1-123 describes the development of the 'new legal historiography'.

the neoclassical economics of institutions finds an echo in the slender but impressive literature of those legal historians who find themselves reacting against conservative, instrumentalist, interpretations of the evolution of legal rules. This chapter and the following one will illustrate the extent to which the issues raised both by the neoinstitutionalist critics of the neoclassical paradigm in economics and the 'revisionist' legal historians of contract share similar preconceptions, common themes and common points of view in their work. Nowhere has the affinity between the two been more apparent in recent years than in the study of the history of contract law where the categories of analysis of both the revisionist historians and the neoinstitutionalist economists have been almost identical and based upon a critique of neoclassical notions of the determinants of legal evolution offered both by lawyers and by economists.

The debate over the rise of contract and, more controversially, the 'death of contract' possesses for lawyers the significance economists attach to the incremental and wholesale criticisms of the neoclassical assumptions used in descriptions of economic organisation and behaviour: indeed, just as the subjects of transaction cost, information asymmetries and the limits of bounded rationality have figured large in the economists' account of legal evolution, lawyers have been concerned principally with the consequences of classical, legal, perfectability in contract, the design of legal rules for equity or even equality in bargaining and the political question of control over contractual obligations and accountability. The twin concerns of economists and lawyers in the two traditions (the

imperfection of allocation through 'contracting' and the existence of social objectives in framing allocative rules) colour the writing of both legal historians and economists. We shall incidentally see how closely related the two have become by studying the development of contract in England between 1770 and 1850 - the period of the 'rise of contract' recently described by one 'revisionist' legal scholar, Professor Atiyah [1].

Because of its considerable importance and apparent unfamiliarity in economic history, Professor Atiyah's important thesis requires some further discussion here, for not only will this argument be supported throughout this and the following chapter, it will also be developed and a more detailed legal economic history of the 'rise of contract' out of its medieval obscurity will be given which accords with the general argument of the present essay. Atiyah maintains that during the late eighteenth and early nineteenth century '[t]he concept of contract was...replacing custom as a source of law' [2]. The development of a mercantile individualism spurred legal change in the area of commercial contract by dissolving the older, customary law of market transactions. From the 1770's, therefore,

[1] Patrick Atiyah The Rise and Fall of the Freedom of Contract (Oxford, 1979). Atiyah's thesis is examined here as a refinement and extension of much broadly institutionalist writing on the later legal economic history of theories of property and exchange obligation, principal among which are William Ashley Economic History and Theory (London, 1888), Book 2, Chp. 3; Thorstein Veblen The Theory of Business Enterprise (New York, 1958), Chp.8; Commons Legal Foundations, Chp.3 and C.B. Macpherson The Rise and Fall of Economic Justice and Other Essays (Oxford, 1985), Chps. 1, 4, 7-8. Only Atiyah's work, however, provides a quitessentially jurisprudential approach to institutional change and relies upon the evidence of the substantive law of elementary contract.

[2] Atiyah Rise and Fall., 37.

the conditions existed in which older assumptions about property rights fell into decline [1] while traditional market sanctions regulating the market on the behalf of the consumer were gradually being eroded [2]. The new law of property contract emerged to replace the medieval law of property as part of '...the now familiar process by which the significance of property rights changed from their use value to their exchange value' [3]. Atiyah summarises this movement toward contract-based commercial exchange in the following terms:

> The period 1770-1870 saw the emergence of general principles of contract law closely associated with the development of the free market and the ideals of the political economists...The period saw the shift in emphasis from property law to contract; and within the realm of contract it saw the shift from particular relationships, or particular types of contract, to general principles of contract and the emphasis shifted from executed to executory contract [4].

The present essay largely accords with Professor Atiyah's interpretation of the legal economic history of the period, but suggests that the legal historians' concern with the history of contract during this period is but a part of a wider historiographical issue of the late Georgian age, namely the emphasis in law and administrative practice upon the reduction of transaction costs associated with exchange.

This subject has offered some scope to both economic historians and legal scholars of late, though only the latter have been principally concerned in the study of the development of the doctrines of contract after 1600. The

[1] Ibid., 102.

[2] Ibid., 65.

[3] Ibid., 103

[4] Ibid., 398.

very complexity of the issues involved in approaching the whole thesis of a 'revolution' in contract means that only those parts of the argument which obviously accord well with the general thesis advanced here will be discussed, although we shall be saying a good deal more - and in rather more detail - about specific issues related to that revolution than has hitherto been thought necessary. By analysing the history of contract law during the period I want to show both how far legal and economic revisionists agree in their assessment of the significance of contractual evolution and illustrate how the development of contract during the early nineteenth century affected the economic life of Britain by changing the rules for the allocation of property rights themselves. The history of contract during these years is one of significant if incremental change in the protection offered to contractors by the courts - of the decline of notions of perfectability in contract and the rise of an agrarian rather than commercial interpretation of breach,incapacity and insufficiency in contracting. While very few contemporary texts survive which discuss these issues with the clarity required for an appreciation of the trend toward freer contract, we can go some way toward illustrating the fundamental character of Atiyah's 'revolution' by reconstructing the detailed history of the law relating to simple contracting from contemporary cases now forgotten and generally unremarked by lawyers.

By analysing the legal and institutional history of contract law, I further want to show how the institutionalist critique of the concept of transaction cost can be used the better to understand the nature of fundamental changes in English contract before the present century. We

shall see that the economists' definition of transaction cost is compatible with the conservative critique offered by the 'revisionist' contract lawyers. Specifically, we shall see that the existence of transaction costs in a competitive economic system presupposes the existence of enforceable but flexible property rights in law or, more precisely, secure and well established principles of liability in the substance and the execution of contract. We shall see how the law of contract on the eve of English industrialisation actually accommodated the needs of rural as well as of industrial society, and how reform in this aspect of the legal framework was part of a longer term evolution in post-medieval law. We shall also correct the chronology of the revisionist case to support the view that contract law changed in response to the immediate need of English society for a means of enforcing the allocation of property rights whilst maintaining flexibility and minimising transaction costs in the late eighteenth and early nineteenth centuries.

The later history of contract law after the introduction of the 'assumpsit' action (the opportunity to sue someone in the public courts for a breach of an undertaking instead of suing them for a debt) following Slade's Case (1601) has been regarded as a part of the history of commercial law and therefore of law created to suit the needs of the expanding commercial economy of seventeenth century England. Traditionally, legal historians have argued that the law of contract had been created by that case and that the leading principles of that law required little if any alteration or further innovation to make it acceptable and workable in the commercial climate of industrialising Britain. Indeed the traditional

historiography of the development of contract law from the late seventeenth century is clear and unequivocal. Only the doctrine of consideration (the idea that evidence of parting with money or another asset in anticipation of exchange was good enough to prove the existence of a contract) needed refinement, and received it, in the form of gradual revision of the doctrine according to the principles of the new action of assumpsit. Holdsworth, the doyen of the older historians of contract, argued in 1933 that '...the doctrine of consideration is striking testimony to the manner in which the English law of contract has been built up around, and has been conditioned by the development of, the common law actions by means of which contracts are enforced' [1]. Such a history was based upon the assumed universal applicability of this legal doctrine even when social, economic and political change made the original practice of the legal framework of contract invalid. This 'conservative tradition' of legal historiography has until recently been almost unchallenged [2]. Today, writers in this tradition argue mainly over how effective the transition from debt actions to assumpsit actually was and largely ignore the later history of the law at all [3]. They believe that the

[1] W.A.Holdsworth 'Formation and Breach of Contract' (1933) in W.A.Holdsworth Essays in Law and History (Oxford,1946), 134.

[2] Morton J. Horwitz 'The Conservative Tradition in the Writing of American Legal History' American Journal of Legal History 17 (1973), 275-294.

[3] James Barr Adams 'The History of Assumpsit' in Association of American Law Schools (ed.) Select Essays in Anglo-American Legal History (Cambridge,Mass., 1909) , 3, 259-303; J.W.Salmond 'The History of Contract' ibid., 320-338; Charles Morse 'History of the Common Law Theory of Contract' Canada Law Journal. 39 (1903), 379-395; W.A. Holdsworth 'Debt, Assumpsit and Consideration ' Michigan Law Review 11, (1913) :347-357; James Barr Adams 'Two Theories of Consideration' Harvard Law Review 12 (1899), 515-531; Samuel Williston 'Consideration in bilateral contracts' Harvard Law Review 27 (1914), 503-529; George P.Alt 'The Origin and Reason for the Consideration Rule in the Law of Contract' American Law Review. 56 (1922), 345-364.

lawyers and jurists of the sixteenth and seventeenth centuries made significant innovations in the law of contract in accordance with the principles of assumpsit at common law and, specifically, that they had no need to call upon Equity for support. In the words of Sir William Holdsworth:

> The manner in which they moulded the action of assumpsit, partly by logical extension, partly by skilful use of analogies derived from the action for Debt, and partly by their own clear perception of the conditions under which it was expedient to enforce agreements; and the manner in which, by generalising the conditions under which that action lay, they gave the common law an entirely original theory of contract - are perhaps the most striking illustrations of that power [of thought]. No doubt they left some problems to their successors to solve; and since those successors were often men who had forgotten or who had ignored the proceedural basis from which the doctrine of consideration had evolved,they sometimes created more problems than they solved. In more recent years the sounder knowledge of this branch of our legal history, to which the lawyers of the United States have mainly contributed, has restored to us the original basis upon which the creators of that doctrine built [1].

Until very recently, this interpretation of the later history of contract might still be regarded as the most popular and the least challenged. The few earlier criticisms of the conservative historiography took up the specific issue of the innovation of the sixteenth century lawyers with regard to breach and specific performance [2].

Yet a new conservative historiography has emerged: it similarly emphasises the origins of modern contract in the decline of the action for debt and the rise of assumpsit, but also recognizes the later nineteenth century innovations as independent activities on the part of a concerned judiciary facing modern conditions of contracting and seeking a legal framework

[1] Holdsworth 'Debt, Assumpsit and Consideration', 357.

[2] e.g. Harry Ballantine 'Is the Doctrine of Consideration Senseless and Illogical ?' Michigan Law Review 11 (1913), 423-434.

within which to reconcile interests of legal principle and contemporary business and commercial practice. The conservative American jurist James Adams had asserted in 1899 that these modern doctrines were at variance with the strict intention of the founders of the assumpsit action and contract itself and that modern, revisionist, practice in England could hardly fail to be popular in the United States to the detriment of American law [14]. The new conservative interpretation has however developed both an historiographical and a jurisprudential interpretation of contract which emphasises continuity at the expense of innovation. The history of contract is written by the conservatives in two distinct parts – the rise of the action of assumpsit and the clarification of the doctrines of contract, including but without particular emphasis upon the development of the doctrine of consideration, from the sixteenth century and earlier; and, secondly, a period of innovation in the mid- to late-nineteenth century is recognized in which modern doctrines of breach and void condition of contract were discussed and reformed [1]. More significant has been the return to an interpretation of contract – and thus of the history of contract – based upon the moral category of 'promise' rather than consideration. The new conservatives argue that contract as promise is in accord '...with decency and common sense' [2] and that there still exists a specific theory of contract law in spite of the recent development of

[1] The most erudite British conservative writing in the genre is that of Professor Simpson: A.W.B.Simpson The History of Contract Law: The Rise of Assumpsit (Oxford, 1976); idem. 'The Horwitz thesis and the history of contracts' University of Chicago Law Review, 46 (1979), 533-601; idem.'Contract: The Twitching Corpse' Oxford Journal of Legal Studies 1 (1981), 265-277; Idem. 'Innovation in Nineteenth Century Contract Law' Law Quarterly Review, 91 (1975), 247-252.

[2] Charles Fried Contract as Promise : A Theory of Contractual Obligation (Cambridge,Mass., 1981), 6.

what has been called the 'open-textured interpretation' of contracts - a development in the practice of construction entirely separate from the debate [1].

This new conservative approach mirrors the development of a new theory of contract which emphasises the historical discontinuity rather than continuity of the experience of contract under Anglo-American common law and measures the efficiency of contract regimes according to distributive rather than economic efficiency. It argues against the conservative interpretation that there no longer exists a specific and distinct set of doctrines which might be recognized as the traditional field of contract law; legal scholars associated with this 'revisionist' position have in fact talked of the 'death of contract' [2]. Essentially, they argue that the role of assumpsit in the history of legal evolution has been much overstated and that efficient contractual schemes provide efficient liability rules which place greater emphasis upon the ex post allocation of welfare after some infraction of the law than neoclassical theory allows. The revisionist contract theorists, inasmuch as they can be said to adhere to a single legal philosophy, are essentially pragmatists. Here too scholars of jurisprudence and philosophy have played a not inconsiderable

[1] The 'open-textured rule' in contract is discussed in G.H.Treitel Doctrine and Discretion in the Law of Contract : An Inaugural Lecture delivered before the University of Oxford (Oxford, 1981), 4ff.; See also the conservative account in N.E.Simmonds The decline of juridical reason: doctrine and theory in the legal order (Manchester, 1984), Chp.9.

[2] The 'revisionist' position is equally as wide as that of the conservatives, but see principally Grant Gilmore The Death of Contract (Columbus, 1974); Morton Horwitz The Transformation of American Law (Cambridge,Mass., 1976); Patrick Atiyah The Rise and Fall of the Freedom of Contract (Oxford, 1979).

role in defining the development of modern contract, most notably in their treatment of the distributive efficiency of contract settlement and the development of a social-contractual theory of the origins of all contract [1]. This novel approach to the theory of contract parallels recent developments in law in which a more pragmatic and, in the legal sense of the word, an equitable treatment of contract appears to have been developing for some time. Indeed, the recent growth of 'open-textured' interpretations of breach, non-performance and inequality of bargaining in the courts has indicated that the revisionist case for something approaching a common law version of equity principles in contract has received support in some judicial quarters [2].

How might the revisionist-conservative debate relate to the equally earnest debate among economists and economic historians concerning the ubiquity and significance of transaction costs? Clearly the conservative viewpoint draws upon a more formal conception of rule-making than that of the revisionists. In fact, whilst the new conservative contract theorists have dropped much of the older conservative argument concerning the inalienability of legal principle from contract they have not entirely abandoned the tradition of adherence to a strict interpretation through a single coherent theory of legal activity and rule-making in their

[1] In particular A.T.Kronman 'Contract Law and Distributive Justice' Yale Law Journal, 89 (1980), 472-511; I.R.MacNeil 'Essays on the Nature of Contract' North Carolina Central Law Review, 10 (1979), 159-200; Harry W.Jones 'The jurisprudence of contracts' in Gabriel M.Wilner (ed.) Jus et societas: essays in tribute to Wolfgang Friedmann (The Hague, 1979), 169-180.

[2] A popular account of open-textured readings in action is the judgment of Denning, M.R., in Lloyd's Bank v.Bundy (1975) 3 All ER 763-764.

interpretation of the history of contract law. Thus contracts are made according to the new conservatives against a background of deeply rooted moral principles which are embedded in the contractual, and thereby the economic, process. These principles are said to exist in the absence of specific institutions and, significantly, remain unaffected by institutional innovation. Institutions do not call into being legal rules; rules pre-date, even predetermine, the emergence of the institutions. In their ubiquity, timelessness and fundamental character, these rules possess all of the characteristics commonly ascribed to transaction costs by neoclassical economists. It would be idle to extend the analogy to the dynamic model for the contract theory of the conservative lawyers and the property rights model of the free-market economists seek to explain different types of economic and legal evolution: the first is interested in rule-making merely as a moral or political activity and is plainly anti-historical whilst the latter views it as an economic activity.

Nevertheless the anti-institutionalism of the conservative contract lawyers is precisely that area of their case most readily and enthusiastically attacked by revisionists as being unrealistic. The revisionists have in fact stressed that the will to contract of equal partners became in the course of the eighteenth century the most important determinant of the evolution of the case law of contract in the century 1750-1850. Dicey had already intimated a similar view when arguing for the historical importance of the nineteenth century as a period of significant legal innovation, although he had not directly ascribed this to the development of the so-called 'will theory'. Dicey's account was based

largely upon a perceived division between public and private issues in contract which, he argued, emerged in the course of the century [1]. (Such an argument has been avidly pursued by some new conservative theorists of late [2]). Even among revisionists it has been common to identify the early nineteenth century as the lesser of two periods of innovative reform in contract. In fact the chronology of the revisionist case is largely the same as that of the conservatives: the later period (from 1863 to 1900) is said to have witnessed the solid achievement of specific reforms, notably the introduction of the idea of the 'frustrated contract' (the sort of contract which becomes impossible to enforce for reasons altogether out of the control of the contracting parties), the specification of the contractual powers of the state and the development of the law of evidence from a medieval obscurity to an instrument for judging the validity of all contracts. In this chapter I want to argue, in support of the revisionist case, that the reformation of contract in the early nineteenth century was the start of a wider reassesment of the scope of contractual power, but that the contract reformation of those years was a product not of commercial or industrial needs but rather of agrarian ones. In the next chapter, I want to show how the revisions of the law of contract in England between 1750 and 1850 answered the needs of the community for more clearly defined property rights in transaction and that whilst the 'will theory' itself (the supposition that the 'wills' or wishes of parties to a contract were paramount) was an attempt to abridge transaction costs by reducing litigation, the early nineteenth century reforms operated at a simpler

[1] A.V.Dicey Can English Law Be Taught at the Universities? (London, 1883), 13-19; idem.'Blackstone's Commentaries' National Review. 54 (1909), 653-675.

[2] Simmonds Decline of juridical reason. chp.9 and works cited there.

level through institutional innovation in relation to simple, market, contracts.

Far from disagreeing with the revisionist perspective, the broadly institutionalist perspective adopted throughout this essay suggests that we should seek to assess how rooted these innovations were in substantive institutional change in contemporary society and economy. In fact, as we shall see, the great innovations of the nineteenth century lawyers – obscured by the conservatives and hailed by the revisionists – had their foundation much earlier (in the late eighteenth and early nineteenth centuries) and affected to a considerable degree the institutional framework of the domestic economy. Some detailed illustration will provide the focus for the analysis of changes in law most nearly affecting Englishmen during these years. Through this study we shall see how far the arrival of a new law of contract may have been related to autonomous efforts to reduce transaction costs through the reduction in opportunities for self-seeking behaviour and the regulation of contractual bargaining. In particular, we shall examine a number of areas in which revisionist legal historians have discovered evidence of a genuine 'revolution' in contract and, by a closer examination than has hitherto been attempted, we shall discover considerable evidence of a Hanoverian, not Victorian, reconstruction of contract law. The most significant of these revisions, because of its general failure to receive widespread recognition as a principal reform of the Georgian courts before 1837, was the attempt to develop a law of frustrated contract.

Before the emergence of the idea of the frustrated contract [1] the presumption that contractual arrangements should always be unavoidable (enunciated in Paradine v. Jane (1647) [2]) guaranteed the inviolability of contracts. For contractors after 1647 in most situations once contracts had been made it was known that withdrawal from the conditions of their contracts on the grounds of the impossibility of their carrying them out was difficult. By the eighteenth century, jurists had come to rely upon this elementary law of contract for the settling of relatively complex questions relating to the most simple forms of contract, basing their argument upon the implied inviolability of contractors wishes and the advantages of Paradine in increasing the confidence of the commmunity in the legal instruments of contract. For much of the eighteenth century therefore little amendment to the common law of contract performance was thought necessary as a corrective to Paradine. Indeed during the late eighteenth and early nineteenth centuries the most eminent of jurists actually widened the scope of the rule of Paradine [3]. Yet even before the enunciation of the 'doctrine of frustration'[4] by Lord Blackburn in 1863 lawyers tried very hard to wriggle free of the unrealistic notion of the inviolability of contract associated with the seventeenth and eighteenth century contract theory they had inherited. Only in relation to repairs was a theory of frustrated contract available to law before 1863 according to the traditional

[1] Chitty on Contracts (24th ed., London, 1977), I, para.4-5.

[2] 82 ER 897-8.

[3] e.g.Atkinson v. Ritchie (1809) 103 ER 877-9 per Ellenborough, C.J. at 878; Bullock v. Dommitt (1796) 101 ER 753.

[4] i.e. the idea that where overwhelming obstacles exist to the performance of a contract it need not be fulfilled. Taylor v.Caldwell (1863) 122 ER 309-315.

historiography of contract [1]. The law in this field it has been argued entertained no intention of reform before the reform in covenant law in Tulk v. Moxhay (1848) [2] and did not initiate innovation in relation to the privity of simple contract. However there does appear to have been at least one notable attempt to provide a definition of frustration not entirely incompatible with later doctrine, the subtlety of which indicates how far innovation in relation to the frustration of elementary contracts still depended upon notions of sanctity inherited from the early common law theory of obligations. It also suggests, powerfully, that private rights in contracts might from time to time escape the 'catch-all' provisions of the common law in spite of the iron rule of sanctity.

In 1796, Praed, J., argued not that intentions of the parties to the contract had to be reasonable but rather that the performance of the contract had to be reasonably interpreted. Like much of the case law we shall have cause to examine his arguments rather than the application of his conclusions to other cases indicate the significance of this revision of the common law. In the case opinion of Praed, the failure of a bridge to resist the excessively fast flowing and abnormally high waters of a river was said to be an unreasonable interpretation and expectation of the contract [3]. Praed's statement of his interpretation of the law in the Brecknock Company case is sufficiently interesting to reproduce:

[1] The only detailed account remains 'E.F.' 'Evolution in the Law of Contracts and the Covenant to Repair' Law Times, 144 (1918), 418-421. It is erroneous on several counts.

[2] 47 ER 1345-50.

[3] Company of Proprietors of the Brecknock and Abergavenny Canal Co. v.Pritchard and others (1796) 101 ER 808 per Praed,J.

> Although a loss by a common flood was probably in the contemplation of the parties, they did not look forward to the extraordinary flood which was alledged in the plea as the occasion of this loss, nor was it in their contemplation to become insurers...Even in cases of covenant, as well as in cases of legal obligation of the parties, impossibility will discharge the party from the performance of his contract.

Of course some elements of the older assumpsit notions of contract in which parties' intentions alone determined the performance of the contract were present even here. Praed remarked, after all, that the impossibility of performance of the contract depended not upon some physical impediment to the execution of the contract (the bridge might actually have been designed to be stronger in fast waters) but rather upon there being no intention of one of the parties to act as insurers. Yet the complexity of this seemingly innocuous judgment betrays evidence of a substantial attempt at revision of the law of frustrated contract. In a subsequent part of his judgment Praed went on to draw a comparison with Keighley's Case [1] - a case in which a prescription to repair a wall was held to be unreasonable in a circumstance similar to that related in Brecknock Company. Prescriptive rights (rights to take the benefit of some asset in return for some payment) unlike the ownership of physical assets of a contract might include some element of a duty to the asset to maintain it carefully. Yet a duty of care in relation to a prescriptive right seemingly made little sense: how might one have a duty to an asset owned by someone else? It was quite impossible to expect a prescription holder to exercise such a duty in relation to an unanticipated event. 'Now' argued Praed '...a prescription supposes some original contract...' so that by analogy, in the original contract no less than in a covenant, and with the intention of the parties fully within the view of the court, the impossibility of performance through some fundamental

[1] 77 ER 1136-1139.

frustration of the contract must be allowed.

This early attempt to revise the law of contract by challenging the pre-assumpsit notion of a universal duty in bilateral contracts differed significantly from later attempts to devise rules for exceptions to the 'reasonable performance' of a contract - such as the later doctrine of frustration itself and the attack upon contract inviolability in the last quarter of the nineteenth century. What was significant about the Brecknock case was that it achieved the perfect balence between sanctity of contract and common sense, an achievement all the greater because the later nineteenth lawyers singularly failed to match it; it also made no appeal to the legal fiction of the existence of an unwritten condition of contract that physical impossibility of performance nullified contracts [1]. These later efforts depended upon an interpretation of contractual obligation which in turn rested upon the assumed difference between public and private interests - made explicit at last in Printing & Numerical Registering Co v. Sampson (1875) [2]. These developments resulted from the increasingly popular appeal to principles of 'public policy' (broadly, the convenience of the public) in the courts, a significant engine of commercial and public law reform during the course of the nineteenth century and of importance

[1] The only similar treatment of Brecknock to my own demonstrates the importance of the rule established by the case: see Roy Granville McElroy Impossibility of Performance (Cambridge, 1941), 10-11, 62-3. McElroy recognized that legal innovation in this period effectively determined the course of later legal history inasmuch as the physical impossibility of performance and the performative incapacity of contractors were for the first time separated - effectively the rule of Brecknock. Contemporary commentators undoubtedly agreed with this reading, an interpretation now lost to legal theory. For a close exposition, see 'C.J.G.' 'Of the rights of action arising upon a part performance of a contract' Westminster Hall Chronicle & Legal Examiner 1 (1835), 169-172 et seq.

[2] (1875) LR 19 Eq 465.

here in relation to its first use in contract law in the early years of the nineteenth century. The concept of 'public policy' requirements was, in fact, quite a novel development in English law for, in the words of Professor Wicks:

> During the seventeenth and eighteenth centuries the courts used the doctrine of public policy sparingly, only invoking it where a contract was clearly unmoral and no statute could be found forbidding it. During the nineteenth century, however, the liberalising influence of equitable principles...made a permanent change in the character of the doctrine of public policy [1].

Indeed it was not until social reform by statute became a feature of late Georgian and Victorian government that the 'public policy' issue became important in deciding cases of breach of contract and discovering consideration in cases involving commercial property. The one exception to this pattern - the earlier adoption of public policy rules in relation to acts in restraint of trade in merchant shipping [2] - though interesting in itself is hardly conclusive. Previously public policy had only appeared as a means of regulating acts in restraint of trade generally regarded as being 'against the benefit of the Commonwealth' [3], though few such cases

[1] James Wicks Consideration in the Law of Simple Contract (London, 1939), 38.

[2] Of the major cases refering to public policy criteria in relation to the seemingly perennial problem of fixing seamens' wages , for example, Harris v.Watson (1796) 170 ER 94 used 'public policy' in the rule of the court.For more traditional approaches see Stilk v.Myrick (1809) 170 ER 851;Frazer v.Hatton (1857) 140 ER 516-522;Harris v.Carter (1854) 118 ER 1251-1253; 'The Cambridge'(1829) 166 ER 233-236.Legislation in 1854 (Merchant Shipping Act,s.2) recognized the superior force of the public policy criteria.

[3] Colgate v. Batcheler (1601) 78 ER 1097. Holdsworth cites this as the earliest example of the use of public policy in relation to the restraint of trade. W.A.Holdsworth A History of English Law, 8 (London, 1925), 57. From the late seventeenth century, legal texts cited much earlier cases, and clearly the appeal to public policy was regarded as very much a part of the common law of contract. See, for example, 'J.A.' The Law of Obligations and Conditions (London, 1693), 46.

specified the nature of the social disamenity the courts sought to remove by interpreting the contract in such a fashion [1]. This is not to suggest that nineteenth century courts, unlike their predecessors in early modern England, liberally applied the criteria of public policy in review of most contractual obligations. There were indeed limits to the suitability of the appeal to the principles of public policy even in the nineteenth century and, in general, the growing popularity of the appeal to public policy had little effect in the countryside. Certainly very little of the Georgian public legislation and case law - though more of the Victorian - was stamped with public policy 'rules' and prevented the conclusion of contracts which appeared contrary to the public interest. Indeed only in some few exceptional cases were arrangements for contracts which were clearly against the public interest or even likely to inhibit 'public convenience' (such as wagers intended to influence the outcome of certain political events or the destination of real property [2]) declared prohibited by the common law. Futhermore, even though much of the medieval law prohibiting restraint of trade might have been thought to affect much of the elementary contracting undertaken in the rural shires of the south, little use appears to have been made of this aspect of the common law even in opposing (or effecting) enclosure or field consolidation. Before the development of the so-called 'will theory' in the late eighteenth century jurists argued that 'common contracts' of the sort ordinarily made in agricultural communities for the transfer of land and chattels were '...no

[1] Barrow v.Woods (1643) 82 ER 470-472;Ferby v.Arrowsmith (1669) 54 ER 239 (defendant argues public policy); Broad v.Jolliffe (1614) 79 ER 278-9.

[2] 'Legality of Wagers' Westminster Hall Chronicle & Legal Examiner 2, 30 (1836), 191-97; ibid., 2, 31 (1836), 213-27; ibid., 2, 32 (1836), 239-46

part of the law of nature' [1] and that consequently no question of public policy could ever arise in relation to them. Only where the condition implied by an obligation was contrary to natural law was its performance thought to be void so that the relief offered by public policy doctrine could not be extended to simple contracts and obligations. Yet most agricultural contracts were, by the early nineteenth century, no longer simple contracts; from the late Georgian period the development of new forms of contracting advanced elementary contracting for land and services, a tendency reflected in the parallel development of the more complex law relating to breaches of contractual obligation.

Of more lasting importance for the contracts which comprised the majority of property transfers incurring transaction costs, indeed, were the new rules for breach, non-performance and, most significant of all, estoppel all of which changed the character of the simple executed contract as much as they aided the development of the executory contract. The development of estoppel, often overlooked in the history of contract, deserves particular attention because early nineteenth century jurists used it as a vehicle for significant reforms in relation to so-called elementary contracts; it also illustrates well how even minor changes in the practice of law in relation to contract might affect the exchange of property rights.

Of all the categories of contractual breach and remedy the most important yet least regarded as far as the development of the contract 'reformation'

[1] [Anon.] Enchiridion Legum: A Discourse Concerning the Beginnings, Nature, Difference, Progress and Use of Laws in General: And in Particular of the Common and Municipal Laws of England (London, 1673), 20.

is concerned was the increasing use and wider definition of estoppel. 'Estoppel' is a doctrine of law - a principle observed by the courts - which states that a person may not deny something to which he has been a party if sufficient evidence or testimony exists to prove that his agreement was obtained in the making of the original contract. Since the sixteenth century, however, it has also been a means by which property can be costlessly transferred. If 'A' denies a promise to transfer property to 'B' whilst satisfactory evidence of even the vaguest kind exists of the promise, then the property legally belongs to 'B', the court effecting the transfer without either party incurring the cost of a specific contract. This subtle principle and practical implication of estoppel was difficult to escape by the eighteenth century. A defence of non est factum (literally, that 'it is not my deed') could still be made by certain classes of contractors in our period (notably married women and children) although a defence of non compos mentis at the time of the contract was rarely allowed as a defence for breach of contract. During the late eighteenth and early nineteenth centuries, estoppel and other doctrines of pleading and evidence in relation to breach of contract came to importance precisely because innovations in contract law had made it possible that contractual obligation depended upon what the parties intended. With the transformation of the assumpsit action for breach the status of pleas of estoppel changed - and even the plea of non compos mentis was rehabilitated as evidence of void contract [1].

Initially jurists were unwilling to recognize estoppel in relation to simple contracts upon small estates - and in particular so-called

[1] On 'non compos mentis' see the historical discussion of Fry, L.J. in Imperial Loan Company v. Stone (1892) LR 1 QB 602. On 'non est factum' pleas by married women see the nineteenth century annotations to Whelpdale's Case (1605) 77 ER 241 note (c).

contingent remainders. Rather estoppel as a mode of conveyance appears to have been most commonly associated with the fine sur concessit generally made available in Common Pleas for estates granted for life only [1]. In spite of earlier decisions in favour of similar treatment for leases for years [2], when during the eighteenth century a review of estoppel in relation to fines was made the opportunity to clarify the position of the executory fine was seemingly ignored by several authorities in spite of consistent and learned argument to the contrary [3]. The curious fact is that by the late eighteenth century writers like Cruise were clearly impressed by the doctrine of estoppel in relation to a present fine, but remained unimpressed by the arguments used in Edwards v. Rodgers (1636), which gained support in contemporary judgments and which sought to extend to executory fines the privileges of pleading available in a suit on a present fine [4].

Holdworth, writing earlier in this century and against the background of a

[1] James Chetwynd A Treatise Upon Fines: to which is added some General Observations on the nature of Deeds leading and declaring the Use of Fines and Recoveries (London, 1773), 5-6. Charles Fearne An Essay on the Learning of Contingent Remainders and Executory Devises (London, 1772) observed, apparently mistakenly in the light of the seventeenth century case law, that '...a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue to the contingency' (p.60).

[2] Trevivian v. Lawrence (1704), 91 ER 241-2; Gilman v. Hoare (1704), 91 ER 241,747.

[3] The cases regarding estoppel of fines for executory fines at mid-century were Wright v. Wright (1749) 27 ER 1111-1113; Whitfield v. Fausset (1749) 27 ER 1097-1102; Taylor v. Phillips (1749) 27 ER 999-1000. Compare Kenyon, C.J. in Goodtitle v.Morse (1789) 100 ER 623-627.

[4] [William Cruise] An Essay on the Nature and Operation of Fines (London, 1783), 115, 211; Edwards v.Rodgers (1636) 82 ER 239.

legal historiography of contract which ascribed a greater role to the development and consolidation of 'consideration' argued persuasively that Lord Mansfield's attempt in 1762 to extend estoppel to 'estoppel by conduct' was the most significant innovation in relation to the doctrine during the century 1750-1850 [1]. Indeed, had it received general acceptance in the later judgments of distinction in relation to estoppel, Mansfield's idiosyncratic view might have effected a significant change in the role of estoppel. In fact Mansfield's attempted reform of estoppel - merely a part of his projected but unstated plan for a reform of the law of evidence itself - was never intended to reduce directly the costs of contracting and was not followed by any concerted attempt by later jurists to revise evidence. In a number of cases much hailed by recent conservative legal historians, Mansfield attempted to make contract dependent both upon the written evidence of consideration and the existence of a simple promise to undertake some action equivalent to exchange, with or without consideration - in short, to depend upon the conduct of the parties with respect to their obligations for evidence of consideration [2]. As a part of the law of evidence this interpretation of contract failed to survive

[1] Holdsworth History, 9, 161-63.

[2] On Mansfield's conception of the role of evidence in contract, see C.H.S.Fifoot Lord Mansfield (London, 1936), 75-79. Pillans v. Van Mierop (1765) 97 ER 1035-1041, based on the Statute of Frauds s.4 is the best remembered of these cases among lawyers and celebrated by Blackstone (Commentaries (7th edition, London, 1790), 2, 445). However the lesser known dicta of Hawkes v. Sanders (1782) 98 ER 1091-1094 per Mansfield, L.J. at 1093 was the more renowned for contemporaries, in which Mansfield argued that some moral obligation was good consideration and that therefore evidence of the existence of moral responsibility alone was sufficient to verify the existence of a contract.

into the middle of the nineteenth century [1] and little of the spirited effort of Mansfield to make promissory contract depend upon evidence alone survived. Certainly very little of the reform of estoppel during the early nineteenth century made use of this unique and complex exposition of the law of contract as evidence. Indeed only in relation to deeds registered at one of the four land registries did the Georgian courts attempt to simplify the law of estoppel as a part of the law of evidence [2].

In a quite separate development, however, and encouraged by the contemporary problem of conveying executory leases and other instruments the doctrine of estoppel did undergo significant revision in substance and in practice resulting in considerable potential benefits for all contractors in the rural world. Writing in 1828, one legal correspondant wondered precisely what the status of executory interests were in relation to estoppel; clearly he was unsure:

> [I]t is perhaps no longer necessary to transfer an executory interest by a fine 'sur concessit' for years. There can be no doubt that the courts would give a declaratory deed accompanying a fine in fee, the effect which the parties intended it should produce; we may now safely regard a title as marketable which depends on that mode of assurance [3].

[1] Judgments nullifying Mansfield's earlier dicta were not entirely successful in discouraging the idea that moral promises required no consideration until Eastwood v. Kenyon (1840) 113 ER 482-7, but the principle that writing negated the need for consideration was overturned as early as 1778 and the general principle that moral promises always implied contractual obligations - with or without evidence - was eventually countered by Lord Justice Kenyon in 1794 (Deeks v. Strutt (1794) 101 ER 384-86). Kenyon's argument is the first and somewhat isolated example of the use of appeals to public policy in relation to contract in defiance of Mansfield (at 385).

[2] Hudson v. Sharpe (1808) cited in P.V.B. 'Covenants in Leases by Estoppel' Law Quarterly Review, 83 (1967), 21.

[3] [Anon.] 'On the doctrine of estoppel with reference to the transfer of contingent and executory interest' Law Magazine, 1 (1828-9), 78.

Such confident expectation appears to have been not misplaced. In a quite separate development reviewed by the correspondant, an equity decision of Vice-Chancellor Sir John Leach made the most significant nineteenth century innovation in relation to simple land contracts [1].

Leach's decision established three significant points: first, that estoppel binds both parties; that estoppel operates where a covenant affecting an equitable trust operates (an extension of the rule in Gilman); and finally and most significantly that a conveyance by the most common of contemporary forms of land transfer in the early nineteenth in England (by lease and release) also operated an estoppel. The Law Magazine correspondant extended the argument of Leach to make clear the implications of the decision:

> And if we are now to regard it as settled that a lease and release may work an estoppel when the latter is by deed indented, which it almost invariably is,it will follow that a title from devisees in trust under the limitation in question, depending merely on that assurance, is undoubtedly marketable [2].

Whilst others were more cautious in their reception of Bensley, conveyance by estoppel of land held by lease and release - and the uses associated with such land - might conceivably allow lands so held to receive both a

[1] viz. Bensley v. Burdon (1826) 57 ER 444-447. A precursor of the decision which appears to have remained unnoticed by contemporaries was Helps v.Hereford et alios. (1819) 106 ER 355-358; see also Right d.Jeffreys v.Bucknall (1831) 109 ER 1146-1149 per Tindal, C.J. where similar arguments were used.

[2] 'On the doctrine of estoppel...', 81.

market and a capital value. Bensley effectively permitted those who held land in trust - for example, those who held land on behalf of minors or others lacking legal capability of action, or older trusts formed from ecclessiatical, academic or state institutions - to transfer the title to them easily and economically. Funds in existing trusts could therefore be mortgaged or could be used as collateral for a loan. It is of course difficult to estimate how far the decision in Bensley and other contemporary supporting cases actually increased the amount of capital borrowed against property by rural title holders after 1834. It is nevertheless clear that by electing to reduce the transaction costs associated with title transfer in this way the courts powerfully increased the potential value of property rights in trade. The economic effect of such a decision may in fact have been marginal in the succeeding decades because the lease and release already operated in place of the fine and no further encouragement was required for its adoption. Indeed, it would be easy to exaggerate the importance of the decision. Rather Bensley and associated contemporary changes in attitude toward estoppel in simple contract may have encouraged the use of the rural land market for the creation of present funds out of future interests at a time when the agricultural successes of the 'high farming' period were already slipping away.

Contemporaries were certainly not unaware of the significance of the decision and, following the introduction of the possibility of estoppel for leases at common law, nineteenth century lawyers actively sought to encourage further the development of a wider interpretation of estoppel as a

useful fiction for exchange and transaction under the common law of contract [1]. Later historians - and lawyers - have failed to recognise the significance of the quarter century of revision in the law of estoppel and several decisions of importance in relation to it [2]. By extending a medieval fiction of law to the domain of contracting upon property held other than by simple title, Georgian jurists removed the hind rance of high costs to extensive contracting for property rights in land. It was only after mid-century that the courts sought to limit the impact of Bensley by declaring limitations upon the general rule [3] by which time much of the force of the rule had already been accepted in other areas of law.

[1] Notably after Bowman v. Taylor (1834) 111 ER 108-111 and Lainson v. Tremere (1834) 110 ER 1410-1414 per Dampier, J. followed in rule of the court. All of these rules, contemporary commentators argued, made the nature of the lease document itself determine whether the agreement worked an estoppel. See [Anon.] 'The Doctrine of Estoppel' Legal Observer, 5 (1832), 138-141, based on a discussion of Bucknall.

[2] See A.M.Pritchard 'Tenancy By Estoppel' Law Quarterly Review, 80 (1964), 395 n.88 on the impact of Bowman and as an early attempt to resurrect the notion of a revolution in estoppel. I maintain that the common error of underestimating the place of Bowman in the history of estoppel comes from Melville M.Bigelow A Treatise on the Law of Estoppel and Its Application to Practice (5th edition, Boston, 1890), 423-424. However, Professor Atiyah avers that Derry v. Peek (1891) LR 3 Ch. 12 at 310 is the first statement of the latterday misunderstanding regarding the role of estoppel in his essay 'Misrepresentation, warranty and estoppel' in Essays on Contract (Oxford, 1986), 310. For a recent review of apparently new and, in nineteenth century terms, unanticipated interpretations of estoppel see Bert M.Feinbaum 'The Recent Recognition of the Doctrine of Estoppel by Lease in Massachusetts.' New England Law Review, 17 (1982), 603-619; George Spencer Bower The Law Relating to Estoppel by Representation edited Sir Alexander Kingcome Turner (3rd edition, London, 1977), 18.

[3] Nickells v. Atherstone (1847) 116 ER 358-61; Jorden v. Money (1854) 10 ER 868-98 per Cranworth,LJ; Wilkinson v. Kirby (1854) 15 CB 430 per Maule, J.; Cuthbertson v. Irving (1859) 157 ER 1034-41. On the place of some of these cases in the history of estoppel, see Spencer Bower Law Relating to Estoppel, 17.

Similarly, the law regarding 'forbearance' underwent significant change at the same time: for the first time, the law began to consider the possibility that immediate remedies for breach might offer a more effective means of policing inadequate contract. The older legal historiography with its emphasis upon the so-called 'revolution in consideration' regarded Longridge v Dorville (1821) [1] as nothing more than an attempt to strengthen the hand of promissory elements in contract. It regarded the rise of promise and consideration as the key to the legal reform of contract in the nineteenth century, but failed to recognize that the early nineteenth century reforms - including the reform of forbearance by the courts - were rooted in the experience of industrialising but rural Englishmen who recognized in the complexity of the assumpsit action for breach a source of economic dysfunction. Indeed, even the great late nineteenth century legal historian Thomas Atkins Street recognized, albeit reluctantly, that the reform of forbearance 'simplifie[d] the issue...' and the practice of action for breach [2].

Forbearance, like estoppel, is a doctrine of pleading rather than an issue for civil action and - also like estoppel - underwent significant change during the period discussed here, with particular consequences for rural contractors. As a part of the law of accord and satisfaction in contract

[1] Longridge v.Dorville (1821) 106 ER 1136-39.

[2] Thomas Atkins Street The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law, Volume II :History and Theory of English Contract Law (Northport,N.Y., 1906), 79-80. In general, see also Atiyah Rise and Fall, 165-6, 438-40.

after the notorious Pinnels Case of 1600, the eighteenth century law of forbearance held that an agreement not to press an invalid or doubtful claim against a party was no indication of a consideration for the contract [1]. An example will make clear the importance of this apparently difficult legal concept. In Manning's Case of 1600 [2], the promise of an heir, who actually received no benefit from his ancestor's estate at death, to pay the debts of his ancestor was said to be unenforceable where the promise had been given in exchange for a promise not to sue him for recovery of the debts. As an element of the law of evidence, the appeal to this principle obviously had wide appeal: where some agreement had been made to forbear suing for recovery of debts or payments - or even damages for some tortious harm - this secondary agreement was no evidence that the original contract stood. By implication, then, forbearance over most of the eighteenth and early nineteenth century implied nothing more than that a secondary obligation existed and was not sufficient to indicate the will of the parties. Yet with the growing dependence of English common law upon the broad principle that the wills of the parties were to be regarded as preeminent as evidence of a contractual obligation, law began to reinterpret the doctrine of forbearance just as it had the law of estoppel. At first such reintepretation of forbearance as there was was only slowly adopted. In some cases, none of which appear to have been recognised as a part of this process, forbearance in relation to insurance was taken to be sufficient consideration for a contract to exist [3] and, after 1824, was

[1] See, for example, the cases cited in Street Foundations, 76-78.

[2] Ibid., 77.

[3] Stock v. Mawson (1798) 125 ER 907-10 ; Thomas v. Courtney (1818) 206 ER 1-4.

taken to actually ameliorate those contracts for commercial insurance dictated by the severe Georgian law [1]. Complex contracts of this sort were however not to be isolated exceptions to a prevailing rule and in the case of Longridge v. Dorville the more general point was established that forbearance - in circumstances to be established finally only over the next century - might be a good consideration for any form of contract, by word or by writing. Discharge from any obligation, then, might be 'bargained' for just as some original contract might be arrived at by a process of free negotiation. One immediate consequence of this principle was that property rights now existed in all forms of assurance for which contractual obligations represented the sum assured; with this guarantee, then, arrangements for penalties contingent upon non-performance were henceforward to be accepted by the courts and became an easily inserted part of elementary contracts. This low cost solution to the problem of policing cases of apparent breach of contract may have actually reduced transaction costs by reducing the assurance and monitoring costs associated with obligations at law.

Finally, in this catalogue of legal innovations intended to reduce the costs associated with contractual exchange, the early nineteenth century courts developed a modern theory of 'novation'. In the course of this discussion of contract during the late eighteenth and early nineteenth centuries, little attention has been paid to the doctrine of consideration which stood at the heart of the older, conservative, historiography of contract. Effectively 'consideration' represents the evidence of a contract

[1] Watkins v. Flanagan (1824) 130 ER 166-170 and 49 Geo.III c.121

in the form of some transferred entitlement, like money or a guarantee to
something - and without consideration proof of the existence of an
obligation is obviously more difficult. The only significant innovation of
these years relating to this important aspect of the law of contract was
the evolution of limitations upon novation, developments well known to and
appreciated by contemporaries but still largely ignored even by
conservative legal historians. Novation effectively deals with the problem
of transferring consideration in debt and properly is part of the law of
debt and not of assumpsit; however, the early nineteenth century courts at
once widened and refined the doctrine in order to facilitate freer
contracting. Imagine that three individuals each has debts: A owes B, and B
owes C (A is not in debt to C, neither is C to A). The doctrine of novation
allows the consideration for the discharge of A's debt to B by his payment
to C for an amount equivalent to B's debt to C - with B's agreement - to be
held and the contract to be declared sound. During the course of the late
eighteenth century, this doctrine was at first merely confirmed [1] but
during the early nineteenth century received refinement sufficient to
ensure that evidence of the discharge of mutual debts (or other
obligations) by novation was achieved [2]. How far the principle was
regarded as a means of reducing bargaining and contracting costs by
contemporaries cannot be assessed; certainly no contemporary comment on the
subject appears in contemporary legal journals and little case law comment
testifies to its being regarded as fundamental to contemporary contract
law. Nevertheless, in common with many like innovations in law during this

[1] Tatlock v. Harris (1789) 100 ER 517.

[2] Cuxon v. Chadley (1824) 107 ER 853-5; Wharton v. Walker (1825) 107 ER 1020-1021.

period, it had the consequence of making contractual arrangements less expensive by virtue of the adoption of strict principles for the verification of the contract itself. Unlike most of the important innovations of the period, it depended upon an interpretation of the doctrine of consideration for its very existence.

Critical readers might object that in relation to all four elements of this hypothesised revision of contract law (forbearance, estoppel, frustration and novation) little evidence has been adduced to support the hypothesis that contemporaries regarded the reformed law of contract as necessarily more efficient and, in transaction cost terms, cheaper than the older medieval law. In fact the only recorded response of contemporaries came from lawyers - probably for the simple reason that the technicalities of contract-making were their concern alone. Whilst, as we shall see, the reform of market regulation often won popular acclamation after persistent complaints [1], in the same way that the reorganisation of market ownership and control had arisen from popular complaints about the insufficiency of existing facilities [2], where legal reform was concerned ordinary people had very little knowledge of the subtlety of developments taking place in the higher courts. What is clear from an examination of these apparently arcane matters is that lawyers regarded their efforts as being directed toward a more efficient law of contract-making. Whilst thousands of elementary contracts continued to be made every day, despite the older law of contracting, there is evidence that legal experts regarded the work of the courts in the late eighteenth and early nineteenth century as innovative, reducing the uncertainty and costliness of

[1] See infra p.269 and throughout Chps. 8 and 9.

[2] See throughout Part 2 above.

contracting. And whilst the remarks of lawyers writing in contemporary books and legal periodicals are not able to tell us how contemporary contractors might have regarded their work, it is only the expert testimony of the lawyers to which the historian has access. It is not possible, as it were, to point to a single satisfied customer; instead one must rely upon the evidence of the professional opinion of those whose work 'underwrote' contract making.

In practice, the materials available do not allow us to substantiate the hypothesis that any individual contract was more easily and cheaply agreed with less obfuscation and difficulty as a result of the reform of contract law (and one cannot even show that more contracts were concluded after the reforms). Nevertheless, the evidence of contemporary jurists counts for much in suggesting that the intention of the law was to make exchange easier and cheaper by making contract stipulations less oppressive, cheaper to specify and more reasonable and reliable. The intention of the courts, then, counts for a good deal in maintaining the argument that the law looked for an opportunity to the make contracting easier - an observation which is amenable to interpretation favourable to the transaction cost model.

CHAPTER SEVEN: CONTRACT REVOLUTION, LEASING AND THE INSTITUTIONAL FRAMEWORK OF RURAL JUSTICE, 1780-1840.

> '[The] transition from a law of property to a law of contract relating to property merely reflects the now familiar process by which the significance of property rights changed from their use-value to their exchange value' [Patrick Atiyah, 1979]

It will be apparent that many of the legal innovations in contract law referred to in the last chapter, whilst extending to simple contracts of the sort normally associated with rural, and non-commercial, legal practice, were driven by a variety of considerations, many of them possibly inconsistent with the notion of transaction costs economising activity. In the simplest contractual arrangements however (such as those for land) the motivation for reform appears to have been the reduction of the transaction costs associated with repetitive exchange and the reduction of specification costs in contract. The background, so to speak, of these specific innovations in rural legal practice included and consisted in part of those general innovations in contract law enumerated above. Yet the peculiar circumstances of English land law placed difficulties in the way of immediate reform. The English system of land tenure and tenancy was one of the most complex and one of the most important of the institutions that determined the size of the aggregate transaction sector in the rural economy of southern England during the late eighteenth century and early nineteenth century. The issue of tenure permeated all aspects of the economic life of the rural communities of the south, for the efficiency of tenure determined both the mobility of all factors of agricultural production and the specificity of property rights in landed property themselves. Inefficient lease contracting, like any other form of contractual arrangement, reduces the specificity of those rights and consequently increases the transaction costs associated with property transfer.

During the period examined here notable efforts were made to increase the contractual efficiency of lease contract with the apparent aim of reducing the costs of exchange incurred in agricultural operations. An often understated aspect of the rise of modern contracting, the economic consequences for agriculture of the contract revolution, once understood, explains a good deal about the performance of the English agricultural sector in the early nineteenth century. While a number of significant and even basic changes had been made in the form of conveyance by lease in earlier centuries - through the specification of lease covenanted responsibilities decided by Spenser's Case of 1585 [1], through the eventual passing away of feudal 'services and obligations' [2] and the abrupt end to conveyance by word of mouth [3] under the late Stuart statutory reform of land transfer, and through the effect of the Tudor Statute of Uses of 1535 upon the performance of covenants following title transfer - the lease instrument itself required little change in form as a legal document and document of contractual arrangement until well into the nineteenth century. Legal writers, particularly those responsible for later abridgements of the law, textbooks and dictionaries of conveyancing practice were

[1] 72 ER 72-77.

[2] Notably by 12 Car.II c.24.

[3] 29 Car.II c.3.

still, in all essentials, able to adhere to the definition of the instrument originally given by Littleton in the sixteenth century. the lease was still a demise of a specified interest or, in Blackstone's often quoted phrase '...a conveyance in consideration of rent' [1].

Yet the legal writers of the early nineteenth century and the courts experienced considerable difficulty in describing how leases should operate and in defining the circumstances in which a lease was, indisputably, a lease and not an assignment of an interest. Thomas Platt, one of the most distinguished nineteenth century authorities on the land law of England, expressed well the root of this confusion in 1847:

> An opinion has very generally prevailed that the existence of a reversion is one of the chief characteristics of a lease; and, what amounts to the same thing in different terms, that the transfer of the whole of a lessor's estate in the hereditaments demised operates as an assignment to the exclusion of a reversion...Within the last twenty-five years, however, the point has undergone so much discussion, and so irreconcilable are the cases relating to it, that they call for examination with some degree of peculiarity [2].

[1] Commentaries on the Laws of England (7th edition, London, 1775), 175. Similar statements of the nature of the lease contract can be found in Giles Jacob A New Law Dictionary: containing the interpretation and definition of words and terms used in the Law (9th edition, London, 1772), qv. 'Lease'; idem. Every Man His Own Lawyer; or a Summary of the Laws of England in a New and Instructive Method (London, 1772), 187; John Trusler The Country Lawyer (London, 1786), 2, note 1; [Anon.] A Law Grammar; or an Introduction to the Theory and Practice of English Jurisprudence (London, 1791), 313; [Anon.] Points in Law and Equity selected for the information, caution and direction of all persons concerned in Trade and Commerce (London, 1792), 137; Richard Burn A New Law Dictionary (London,1792), 2, (London, 1792), 65; Thomas Potts A Compendious Law Dictionary (London,1803), 428-9; Charles Harcourt Chambers A Treatise on Leases and Terms for Lives (London, 1819), 1; James Ram An Outline of the Law of Tenure and Tenancy containing the first principles of the Law of Real Property (London, 1825), 54; Henry James Holthouse A New Law Dictionary (London, 1829), 181.

[2] Thomas Platt A Treatise on the Law of Leases; with Forms and Precedent (London, 1847), 1, 9-10.

Platt was certainly not alone in identifying in his own times a virtual revolution in the law related to the leasing of agricultural property although modern historians have failed to recognize the significance of this change in the principles of tenure and tenancy. Some contemporary commentators, like Amos and Ferard, undoubtedly regarded the nineteenth century reform of the law of the lease as the product of mere '...exceptions and qualifications...' [1]; others like the Scottish solicitor Robert Bell, enviously observing English developments from Edinburgh in 1805, frankly recognized that both countries were making every effort to reform the lease law absolutely to accord with modern conditions of agriculture [2]. The Bar Committee on Land Transfer reviewed the state of the law relating to conveyance and registration of land during the course of the nineteenth century in 1886 and in its report expressed the view that

> When the Real Property Commissioners of 1829 began their labours, the law of real property was nearly in the state in which it had been left by Lord Coke, while the current methods of conveyancing had acquired an enormously increased bulk and complexity. A great part of this was due to the successful ingenuity of conveyancers in devising remedies for the law's admitted defects; and it has accordingly happened, that a large part of the remedial legislation dealing with this subject is little more than the adoption into law of the remedies devised by the conveyancers [3].

Among this array of opinions regarding the nature of the revision of land law undertaken in early nineteenth century England lie contradictions and counter-claims which appear at first sight to negate the idea of a

[1] A. Amos and J.Ferard A Treatise on the Law of Fixtures and other Property Partaking of both a Real and a Personal Nature (London, 1827), xx.

[2] Robert Bell A Treatise on Leases Explaining the Nature and Effect of the Contract of Lease, and the Legal Rights enjoyed by the Parties (3rd edition, Edinburgh, 1820), vii-x.

[3] Land Transfer.Published by Order of the Bar Committee (London,1886), 3.

continuous revolution in legal practice. Yet whilst it will be admitted that the evolution of common law in relation to leasing practice during the early nineteenth century lagged somewhat behind that of other forms of institutional adaptation to the need for high volume, low cost, repetitive transactions, English jurists engaged in a prolonged examination of the principles of leasing during these years with the intention of finally summarizing and codifying in statute the various adaptations of the common law made during the preceding half century and to ensure that the instruments of land conveyance remained efficient in modern contractual environments.

The background to this struggle to find an accurate and workable definition of the function and purposes of the lease instrument is difficult to understand for the economic historian but central for an appreciation of English agrarian economy in the early nineteenth century. The concept of the 'estate' and the interest of the lessor had been carried over from the feudal law of tenures almost entirely unchanged. Yet the function of the lease as a form of contractual arrangement was undergoing significant change independently of the decline in the influence of feudal land law itself. What happened in the course of the late eighteenth and early nineteenth centuries can be best characterised as result of the final decline of contractual instruments as mere statements of legal obligation and the emergence of a new concept of lease contract as a bargain or exchange of contracting and equal parties. Comparison of the standard works

the two centuries on tenurial rights, by Wright and by Chambers [1], licates well the prevailing tendancy of the law. For Wright, writing in 1730s, the superior qualities of feudal conveyance were still apparent. re there was no distinction between the instrumental and the functional pects of the transfer of property rights in land, or between what leases d and were required by their users to do. Land transfer - including nsfer of ownership by lease and release - involved a recognition of igations on entry and exit, for fines and fees and so forth, but did not lemnify parties as formal contracts would. By the nineteenth century, ctice and the necessity for specified contractual relations in all pects of rural agrarian production seems to have brought down not only costs associated with property transfer but also the risk associated h property demise and the renting of agricultural land. This change was iculated through those instruments of contract which expressed the lingness of parties to exchange land as if it were vendable capital her than a lifetime endowment or a fixed asset for the exclusive use of lineage. In the words of Professor Patrick Atiyah, this attitude created

> ...a climate of opinion in which property rights themselves came to seem more absolute, and the old grievances against feudal burdens and taxes helped to give this new attitude to property a sense of legitimacy [2].

1] Sir Martin Wright An Introduction to the Law of Tenures (London, 730); Sir Robert Chambers A Treatise in Estates and Tenures edited Sir harles Harcourt (London, 1824).

Atiyah Rise and Fall. 87.

One consequence of this was the apparent decline in the eighteenth and nineteenth centuries of the formal and fully specified lease as the ideal form of land contract. Freer contracts in which equal parties were regarded as having responsibility to specify fully their own negotiated requirements in the lease replaced the older legal habit of ascribing most of the contractual conditions to customary behaviour and specifying only the deviations from custom. The importance of this slow, but discernible, revolution in legal practice needs to be more fully explained.

For the lease instrument itself, the decline of the enforcement of customary obligation as the legal basis for contracting and the innovation of seemingly unfettered contracting was neither uniformly beneficial nor did it dispose of the problem of defining the lease identified by Platt. It was this latter problem which troubled Georgian courts and prevented the full implementation of the reforms for freer contracting. It might prove relatively easy to distinguish the intention behind an agreement or a lease - Platt suggested identifying evidence of agreement to the conveyance [1] - but it proved to be a good deal more difficult to distinguish the intention behind an assignment (that is, a transfer of title) and a lease. The 'doctrine of wills' (the supposition that evidence of the intentions of contracting parties was sufficient to support the legality of a land transfer) devised to discriminate between lease-type and transfer-type conveyance proved unsuitable as the basis for a rule to define the conditions for legally enforceable assignments or leases. The course of this often confusing legal debate concerning the lease as an instrument of contract for land

[1] Platt Treatise. 1, 598.

law can be best gauged through the remarks of Lord Plunkett in the appeal case of Pluck v.Digges. heard before the House of Lords in 1831 [1]. In discriminating between an assignment and an instrumental lease, Plunkett argued that where an owner could sue for recovery of his land for unpaid rent a title was - incontrovertibly - an assignment and not a lease. Yet Plunkett was well aware of how such an unbending rule might limit property transfer rather than encourage it. In order to incorporate both the doctrine of intentionality (the doctrine that the intentions of the parties to a contract must be assumed to be represented by a valid contract) and the law of rent recovery in a definition of the assignment of a whole interest, Plunkett ingeniously turned to other evidence of intention within assignments and leases. Where a covenant for the renewal of a contract was evident in the document an obvious lease arrangement had been made, for no contracting owner would intentionally fail to specify the reversion of his own land. Plunkett's words are worthy of note as they contain clear evidence of the new spirit in the law of lease contract.

> I have felt it my duty to urge this part of the case [i.e. intentionality] at the risk of being thought tedious, because the notion of a rigid and absolute assignment by an unbending rule of law, independent of the intention of the parties, has been carried in the argument to the alarming extent of saying that the grant of an interest, for the same lives for which the grantor holds, necessarily carries with it the covenant for perpetual renewal, which is a legal covenant running with the land; and that if a person having such an interest grants for three lives, reserving a rent and not purporting to give to the grantee the benefit of the covenant of perpetual renewal, still the grantee must have it by virtue of the absolute assignment; a position this so formidable in this country, where these renewable interests are considered as perpetuities, and where the proprietors are in the habit of demising

[1] Pluck v.Digges 5 ER 219-241. See also Poultney v. Holmes 93 ER 396-7; Preece v.Corry 130 ER 968-9; Palmer v.Edwards 99 ER 122n-123n for other contemporary discussions which replicate much of the argument of Plunkett.

> for the same lives for which they themselves hold... that it goes to shake the foundations of property [1].

What Plunkett and other innovators in the law relating to agricultural contract established, belatedly perhaps, was the independence of the lease instrument as a form of long-term contract. Leases were henceforth to be promulgated and interpreted with the strict intentions of the parties with respect to their covenanted responsibilities. A by-product of this significant innovation in the law of agricultural contracting was the reduction in the specification costs associated with all forms of the leasing of land and property. By restricting the evidence of a lease to the supplementary clauses, or covenants, of leases early nineteenth century lawyers were effectively placing the responsibility for full specification of lease arrangements in the hands of the parties to the lease.

The reason why these arrangements for the interpretation of leases reduced rather than increased specification costs needs further amplification. In parallel developments to those discussed above, late eighteenth and early nineteenth century courts began to 'adopt' the most frequently utilised covenants and to assume their existence from the behaviour of archetypical rational contractors. These 'adopted covenants', which had no customary basis to them, were intended to make contracting easier by reducing the need for irrational covenanted responsibilities; at the same time they did not interfere with the customs and habits of local contract. It is evident, from the legal record of such 'adoptions' that in general, the landlord's covenants were more frequently protected than those of the tenant [Table 6.1]. Nevertheless, the consequence of such adoptions appears unequivocally

[74] Pluck v. Digges per Plunkett, L.J. at 231.

to have been the reduction in specification costs which, when linked with the incorporation of the doctrine of intentionality within lease law, led to more efficient contracting.

Contemporary opinion had already recognised the somewhat invidious position of covenants which proved inimical to costless property transfer

Table 6.1 : Chronology of adopted lease covenants at common law in England and Wales, 1744-1852 (where assigns are not named in the lease).

1744	Lessors covenants to renew leases.
1769	Lessees covenant to use all hay and straw grown on the land.
1779	Outgoing tenants right to be treated according to custom of the country.
1793	Lessees obligation to use land 'in a husbandlike manner'.
1793	Lessees obligation to reside on the premises during the term of the lease.
1808	Lessees obligation not to carry on specified trades on the property unless stipulated in the lease.
1815	Lessees obligation to use land 'in a tenant-like manner'.
1821	Lessors covenant to provide water on the premises.
1852	Lessees promise to put the property in good repair.

Source: R. Cuthbert Brown The Law Relating to Covenants Running with the Land (London, 1907), 6-22.

[1] and by 1847, the year of the publication of the Report of the Select Committee on Agricultural Customs, the general reform of covenants was desperately needed. The revision of the position of covenant use in the famous case of Tulk v.Moxhay [2] in the following year has been regarded as the most significant departure from seventeenth century practice and represents the effective completion of the reform of leasing undertaken by nineteenth century jurists. As the 'coda' to earlier reforms it anticipated latterday developments, in which public policy rather than equitable considerations influenced the law of land transfer, developments which are outside of the scope of the present essay [3].

In the light of the unequivocal condemnation of restrictive covenants by those giving evidence before the 1847 committee - and by contemporary

[1] e.g. [Anon.] Museum Rusticum et Commerciale: or select papers on Agriculture, Commerce, Arts and Manufactures, 3 (London, 1765), 7-8; Arthur Young The Farmer's Guide to Hiring and Stocking Farms, 1, (London, 1770); [J.Lawrence] The New Farmer's Calendar (3rd edition, London, 1801), 130; [J.C.Loudon] An Immediate and Effectual Mode of Raising the Rental of the Landed Property of England (London, 1808), 10ff. It has to be admitted that the Equity side had already recognised this and had attempted to make some alteration to the interpretation of covenants from the mid-seventeenth century (e.g. G. Meriton Land-Lords Law: A Treatise Very Fit for Perusal of all Gentlemen, and others (London, 1665), Chp.IV) but reform here was neither complete nor systematic. Before the rule in Tulk appeared in the Common Law courts the single test in equity of the soundness of a covenant was the 'degree to which they (positive covenants) relate to the thing demised'(John Fonblanque A Treatise of Equity (London, 1793), 1, 344.). It has been argued that Tulk merely followed and applied these earlier rules of equity ('Notes' Law Quarterly Review 4, (1888), 119-120; 'On Covenants Which Run With The Land' Law Magazine 10, (1833), 342-57). This does not negate the argument developed here.

[2] 47 ER 1345-50.

[3] A.H. Manchester A Modern Legal History of England and Wales, 1750-1950 (London, 1980), 321.

critics of the surviving lacunae of leasing covenant law [1], the protection offered to all 'negative covenants' (that is, covenants restricting the actions of leaseholders) by law was extended at one stroke to all covenants, even where they were not considered to 'run with the land' according to the definition in Spenser's Case [2]. Until the rule was restricted in 1881 [3], all covenants which placed tenants or landowners at a disadvantage through new expenditure ('positive covenants') were supported at law. It has been argued that the doctrine of Tulk effected only a minor change in the costs of contracting for land - that '...a would-be purchaser knowing of a positive covenant might sometimes be discouraged by it, though presumably market forces would bring about an abatement of the purchase price which would be a countervailing factor' [4]. It is likely, then, that positive covenants acted more efficiently in the context of bargaining for capital resources once Tulk had removed doubts concerning the negative ones. Tulk probably enhanced the efficiency of the market as an allocative device for property rights in land and cleared away the more common resort to customary lease covenants. This process of covenant adoption and the eventual extension of the equity rule in Tulk probably reduced the transaction costs associated with all forms of

[1] 'Report of the SC on Agricultural Customs...' BPP Sess. 1847-8, 7, (461-i) passim. The debate is fully discussed and a model of tenancy developed in J.R. McCulloch 'A Treatise on the Letting and Occupancy of Land' in Treatises and Essays on Subjects Connected with Economical Policy (Edinburgh, 1833), 165-222.

[2] R. Gilbert Brown The Law Relating to Covenants, 82-99. A covenant which 'runs with the land' relates exclusively to the land and people described therein.

[3] Haywood v Brunswick Permanent Building Society [1881] LR 8 QB 403-5

[4] Simon Gardner 'The proprietory effect of contractual obligations under Tulk v.Moxhay and de Mattos v.Gibson' Law Quarterly Review, 98 (1982), 295-6.

land transfer by reducing the specification costs of contracting.

Through these changes in the legal interpretation of contract a new approach to contracting emerged in the course of the middle of the nineteenth century, more obviously concerned with maintaining the efficiency of commercial contracting. Nevertheless, much of the late eighteenth and early nineteenth century revolution in contract had been explicitly concerned with elementary contracts. The reform of forbearance, estoppel and the law of lease covenant, while all quite different in their detail, nevertheless had this in common : they all succeeded in reducing transaction costs associated with simple bargaining and contracting through reliance upon the 'will theory' of contract. Nevertheless, legal innovation in relation to contract did not create alternative institutions for the policing and enforcement of contracts under the rule of the doctrine of wills. Indeed the non-existence of some framework for the administration of elementary contracts under such conditions suggests that, unlike the case of markets, property rights in verifying contracts could not be subcontracted. Some legal innovation within the courts system however did coincide with the rise of new forms of contracting.

The centralisation of the courts system of the Georgian era is perhaps one of the most enduring of the myths of late modern legal history. The venality of the offices of the court, the corruption and secrecy of the bench and the seeming tolerance by Parliament of the virtual monopoly of the higher courts in judging cases with contingent high fees all seem to point to the conclusion that the power of public opinion to demand reform of the inefficient and quasi-feudal remnants of central, authoritarian,

power was weak and that the impetus for central control through the courts remained strong. Yet Holdsworth's well known claim that '...practically all the judicial work of the country was done by the judges of the common law courts...' [1] appears from recent research to be quite simply fallacious. A number of studies of the courts of conscience and request by Professor Arthurs and others have shown Holdsworth's picture of a highly centralised metropolitian court to be ill-founded [2] for not only were the courts of sessions justices and assize circuits filled with often complex litigation and suit but new forms of legal institution were adap ted to meet the needs

[1] William S.Holdworth A History of the English Law edited A.L.Goodhart and H.G.Hanbury (London, 1964), vol. 14, 182. Elie Halevy A History of the English People in 1815 (Harmondsworth, 1937), vol. 1, 59 ff. is an earlier corrective to this view and still the best general guide to the organisation of the courts system at national and local level.

[2] H.W.Arthurs 'Without the Law': Legal Pluralism and Administrative Law in Nineteenth Century England (London,1986); idem.'Special Courts, Special Law: Legal Pluralism in Nineteenth Century England' in G.R.Rubin and David Sugarman (eds) Law Economy and Society, 1750-1914 :Essays in the History of English Law (Abingdon,1984), 380-411; idem. 'Without the Law : Courts of Local and Special Jurisdiction in Nineteenth Century England' Journal of Legal History 5, 1984,130-149.My work on this subject was undertaken before I was familiar with Professor Arthurs' major work on this subject.Our common use of similar sources in relation to the courts of request founded in the 1830's is due entirely to the duplication of research with necessarily small amounts of material available.Where his published work has duplicated my own, I have deferred to Professor Arthurs and cited his work instead of sources common to us both.

of the new contractual arrangements needed in late Georgian and early Victorian Britain. Indeed through the creation and extension of jurisdictions the courts system of the eighteenth century was readily if partially transformed to accommodate the need for flexibility in contracting. The use of new jurisdictions, defined not by geographical area but by the type of litigation with which they dealt, was the cornerstone of these developments for whilst the concept of functionally different jurisdictions was not novel, during the late eighteenth century an impressive number of writers came to regard the economic efficiency of separate responsibilities for different courts as one of the principal motives for their retention. The rationalist legal theories that grew out of the enlightenment rediscovery of natural law philosophy regarded separate and unique jurisdictions (what contemporaries referred to as 'exclusive jurisdictions') as a guarantee of social harmony, based upon the dubious principle that cases were tried by courts whose work was exclusively dedicated to similar cases, and few jurists considered the economic value of the local administration of local cases directly. However some students of the English courts system were persuaded of the economic efficiency of the hierarchy of courts adopted in England and recognized in the economic efficiency of the contemporary courts system the very basis of the administration of justice. Richard Wooddeson argued, in common with most natural lawyers of his time that while '...magistracy is by the law of nature, reason assuring men that they cannot well subsist without civil society, nor civil society without government...', the need for local jurisdictions might also be demonstrated from the

fact that local property rights needed to be enforced locally [1]. Wooddeson further argued, in a lengthier analysis of the structure of the system of justice in England, that small specific jurisdictions offered an '...easy and prompt means of judicial redress...' unlike the superior courts of common law [2]. Part of this justification for the survival of local jurisdictions came from a reading of legal history, part from the intuition that a local magistracy was always superior with regard to the need to establish property rights in the locality and a number of legal-historical accounts of the evolution of Anglo-Saxon justice in the early nineteenth century in fact married these two themes in attempting to explain the survival of a wide range of exclusive jurisdictions in Georgian England [3].

[1] Richard Wooddeson Elements of Jurisprudence Treated of in the Preliminary Part of a Course of Lectures of the Laws of England (London, 1783), 27. See also James Grant Essays on the Origin of Society, Language, Property, Government, Jurisdiction, Contracts and Marriage (London, 1785), 107-155; Timothy Cunningham Introduction to the Knowledge of the Laws and Constitutions of England (London, [?1812]),14; [Sir William Dugdale] History and Antiquities Relative to the Following Curious Subjects : namely, the Origin of Government; Beginning of Laws; Antiquity of Our Laws in England (London, 1780), 50-58 [This last work was first published in the late seventeenth century but was revised and republished until the nineteenth]. The argument finally received support in 'First Report of the S.C. on Superior Courts in England...' BPP Sess. 1829, 9 (46), 79-80.

[2] Richard Wooddeson A Systematical View of the Laws of England : as treated of in a course of Vinerian Lectures read at Oxford, in a series of years, commencing in Michaelmas Term, 1777 (London, 1792-3), 1, 101.

[3] e.g.William Enfield A Compendium of the Laws and Constitution of England (London, 1809); Alexander Luder Tracts on Various Subjects in the Law and History of England (London, 1810); George Spence Essay on the Origin of the English Laws and Institutions; read to the Society of Lincoln's Inn, Hilary Term 1812 (London, 1812).

In fact the reorganisation of the courts system attempted during the first half of the nineteenth century made much use of these pretended defences of the local jurisdictions of England. The economic impetus to reduce the expenses of justice was primarily responsible for this reorganisation, however, and not an attachment to rural, provincial, justice. The economy of legal expenses encouraged by the Whig parliaments of the last decades of the eighteenth century and popularly supported by many outside Parliament during the first decades of the nineteenth century [1] encouraged a not inconsiderable diminution in the expenditure of the central government upon the justiciary system. The reduced expenditures upon criminal justice alone were marked enough to bring about a substantial fall in the regular revenues from the funds for the superior courts in London. From 1814 to 1820, central criminal law expenses were running at an average of £22,000 per annum, whereas from 1821 to 1827 the same expences averaged only £18,000 per annum and between 1828 and 1834 the average fell to £14,850 per annum [2]. However salaries continued to rise for the higher court officials and judges and between 1814 and 1834 the salaries of the court

[1] Of the many appeals for reduced expenditures on the central courts of justice, see Times 2 February 1806 ; ibid. 30 November 1807; ibid. 9 March 1818; Annual Review 43, 1800, 144; ibid. 47, 1804,586; County Constitutional Guardian 1, 1822, 56-64.The call for reform of the sinecures of the courts by Bentham and his allies is surveyed in Halevy op. cit., 57-59.

[2] Calculated from BPP Sess. 1813-14, 11 (39), 169; ibid. Sess. 1814-15, 9 (154), 196; ibid. Sess. 1816, 12 (238), 178; ibid. Sess.1817, 13 (279), 372; ibid. Sess. 1818, 13 (68), 242; ibid. Sess. 1819, 15 (47), 243; ibid. Sess. 1820, 11 (64), 124; ibid. Sess. 1821, 16 (44), 4; ibid. Sess. 1822, 19 (21), 450; ibid. Sess.1823, 13 (49), 235; ibid. Sess.1824, 16 (13), 242; ibid.Sess. 1825, 18 (29), 342; ibid. Sess. 1826, 20 (86), 164; ibid. Sess. 1826-7, 15 (160), 271; ibid. Sess. 1828, 17 (48), 420; ibid. Sess. 1829, 16 (40), 281; ibid. sess. 1830, 18 (88), 488; ibid. Sess. 1830-1, 6 (280), 339; ibid. Sess.1831, 13 (30), 273; ibid. Sess. 1831-2, 27 (278), 669; ibid. Sess. 1833, 24 (168), 456; ibid. Sess.1834, 42 (183), 432.

sheriffs, the Clerk of the Hanaper and the Judges of the Common Law courts of England rose from a total of £69,546 to £377,966 [1]. Certainly some part of the explanation for this significant rise in officials' and judges' salaries against a background of a relative fall in the funding for the higher courts should be sought in the changing pattern of funding of the courts after 1814 - for fees, the major source of income to judges from most higher courts, had already undergone a significant decline themselves by 1814 [2] and sums advanced from the Civil List for payments to 'Law and Justice' (effectively to the superior court judges and their attendants) never amounted to a significant additional contribution to the salaries of court officers even after they had been officially allowed in 1802 [3]. Yet if the expenditures upon the administration of justice through the superior courts and upon the salaries of the officers of the court appear to have moved in opposite directions, this is principally the result of the significant effort of the Select Committee on Finance of 1798 to reschedule legal expenditures away from the higher courts and to encourage summary

[1] Calculated from figures in BPP Sess. 1868-9, 35 (366). Figures have been calculated to exclude the incomes of those engaged in metropolitan or colonial courts sitting in London.

[2] 'Return of Fees in the Courts of Justice...' BPP Sess. 1813-14, 13 (102), 33; 'Committee of Inquiry into the Courts of Justice of England...'BPP Sess. 184-15, 18 (234 & 250), 33; 'A Return of any Increase of Rate of Fees demanded and received in the Several Superior Courts of Justice...' BPP Sess, 1813-14 (230), 33-84.

[3] 'Details of Sums paid to the Civil List in Each Financial Year...to replace advances for grants' in App. IV to BPP Sess. 1868-9, 35 (366), 457. After 1807 these supposed grants never rose above £10,828 a year.

justice in the local courts and assizes [1].

Unlike the earlier committees of enquiry into the administration and use of the revenues from the previous decade - such as the Home Office's unpublished report of 1785 on the expenses of the Auditors Office and the better known Commission of Enquiry into Fees and Emoluments of 1786 [2] - the 1798 Select Committee report neither sought to deal with all of the expences of the courts system nor to fulfil election promises of the reduction of sinecures and venal offices. The 1798 Committee concentrated solely upon the nature of the contemporary superior courts system and the associated costs. It identified two specific problems within the existing framework of justice: first, it noted that the system of so-called 'official fees' had become anachronistic and that salaries now represented the major source of income for the London-based higher court judges; and, secondly, it recognized that too many courts freely employed deputies in large and ever increasing numbers, deputies whose combined incomes seldom totalled less than three or four times the income of one judge. Consequently their major recommendation was '...that Reduction and Retrenchment might be made most profitably to the Public, by the

[1] 'Twenty-seventh Report from the Select Committee on Finance...' HC Repts. 13, 1798, 199-343. Further citation comes from the published report, Courts of Justice. The Report of the Select Committee Appointed by the House of Commons to Enquire into the Courts of Justice in Westminster Hall, the Courts of Assize, the Civil Law Courts and the different Subordinate Offices attached to each Court (London,1799).

[2] e.g. 'Accounts of the Office of Auditor...'[1785] PRO (Kew) HO 42/6/56-7; 'Report of the Commissioners on fees and emoluments of the Public Offices...'[1786] PRO (CL) PC 1/17/A 13(b) box 2; PRO (Kew) HO 42/10/1-53 [copy].

Suppression of Offices which may be deemed comparatively inefficient' [1].

Measuring the inefficiency of those posts appears to have been both difficult and protracted, yet the final recommendation of the committee to Parliament consisted of a suggested diminution of the salaried posts in the higher courts which plainly duplicated those of the provincial magistracy or served no real purpose in making the administration of justice more efficient. This meant more than merely sending fewer cases to the higher courts; it implied that a more efficient mechanism for the execution of criminal justice and all forms of civil suit which found their way to the higher courts had to be developed. Consequently, and with the apparent assent of later governments, a significant and irreversible shift occurred in the allocation of resources for the administration of justice away from the metropolis and toward the rural and provincial courts of England between 1800 and 1850. Table 6.2 below records the magnitude of that change in the distribution of total expenditures for the provision of courts through public expenditure by reconciling two entirely separate sets of estimates of funded expenditures by their provenance.

The transfer of over ten percent of total justiciary expenditures to the provinces by 1850 seems at first rather small in proportion to the overwhelming proportion of regular payments still enjoyed by the centralised offices of the higher courts. However this transfer of substantial sums was frequently applied to the development of existing jurisdictions or even to create new ones. Even before the appearance

[1] Courts of Justice, 24-5.

Table 6.2: Structure of expenditures upon 'legal services', 1798 and 1850. (percentage of total expenditure on legal services by all government agencies, local and national).

	1798	1850
Superior courts and officers	75.5	65.3
Inferior courts and parish enforcement	24.5	34.5

Sources: HC Repts. 13, 1798, 199-343; ibid. Supplement II,1804 (175), 716 ; 'Report of the S.C. on County Rates...' BPP Sess. 1850, 13 (468), Appendix E, 285-6

of Brougham's bill of 1830 for the setting up of 'district courts' substantial attention had been given to the problem of encouraging increased business to be done through local courts. The obvious solution to the problem of immediately transferring more routine business to the provinces was to reduce the amount of small claims routinely processed in the superior courts by transferring the business to new or established provincial jurisdictions. Indeed the majority of the new courts created between 1800 and 1840 were established as courts of record purely for the settlement of small debts. Most of these new small debt courts were founded in the 1830's, under the aegis of the Brougham act, but in the first decade of the nineteenth century some twenty-one such courts had already been established across England, largely but not exclusively in accordance with the regulating Act for the Recovery of Small Debts passed in 1786 [1]. By

[1] Calculated from the Local & Private Acts (1800-). The acts for the creation of these new courts were, in number: 1800-10, 21; 1811-20, 1; 1821-30, 0; 1831-40, 41. The 1786 Act is 26 Geo.III c.38.

1830 in England there were 481 courts of local jurisdiction, including 250 courts of request of which 165 had power of committal for small debts [1]. The significance of the creation of these new courts should not be misunderstood. Whilst the majority of the ordinary jurisdictions of England were not courts of record, the majority of the new courts for the recovery of small debts certainly were (Table 6.3).

Table 6.3: Number of courts issuing process in all suits (assumpsit, replevin etc.) and issuing process for the recovery of debts of less than £5, 1830-31, by type of court in England and Wales.

	All Suits		Debts of less than £5	
	N	%	N	%
Record	75	15.6	75	47.2
Request	63	13.1	57	35.4
Pleas	35	7.3	19	11.8
County/ Borough	126	26.2	3	1.9
Manor, Leet and Baron	115	23.9	1	0.6
Other	67	13.9	5	3.1

Source : ' Abstract of the Return of the Number of Courts of Law in England and Wales...' BPP Sess.1830, 23 (15),217-255;'Fourth Report of the R.C. on the Practice and Proceedings in the Courts of Common Law' BPP Sess. 1831-2, 25, part 2 (239), Appendix I part v,283-593.

Courts of record perform quite a different function from other courts for their major purpose is the recording or official recognition of titles and other forms of legal document. In effect, the small court of record makes

[1] W.H.D.Winder 'The Courts of Requests' Law Quarterly Review 52, 1936, 387, note 8; 'An Abstract of the Return of the Number of Courts of Law in England, Wales and Ireland, whether under the name of Courts of Requests, or any other name, which have power of committing to prison for debts of £5 and under £5...' BPP Sess. 1830, 23 (15), 217-255.

legally legitimate the property rights of individuals. Alongside the courts of record founded for the purpose of debt recovery, courts of request - usually extentions of existing jurisdictions - were also created. Their greater popularity, with legislature and public, was largely the result of their dealing exclusively with recovery and not with cases of disputed title [1]. The growth of these small courts, intended to deal primarily with small debt claims were established first in those rural, provincial, towns which had already some local and well established jurisdiction and whilst those existing courts were often little better than ill-organised courts leet or courts baron which had all but fallen into disuse, it seems to have been the intention of the Georgian reforms which preceded the Brougham act to add to the effectiveness of these existing courts of record. Towns like Bradford-on-Avon in Wiltshire [2], Boston in Lincolnshire [3], Halesowen in Warwickshire [4] and Ipswich in Suffolk [5] were among the first such jurisdictions sanctioned - all market towns in the predominantly rural south. Yet gradually the small claims courts established by Parliament began more frequently to be associated with the needs of the trading community of manufacturers of the northern industrial towns. After 1837 only 9 courts were established in towns to the south of a line from the Severn estuary to the Wash. Contemporary commentators certainly recognized the small claims courts of request established after

[1] Ritson op. cit, 47; Robert Maugham Oulines of the Jurisdiction of all the Courts in England and Wales (London, 1838), 7.

[2] 47 Geo. III sess.2 c.39.

[3] 47 Geo. III sess.2 c.1.

[4] 47 Geo. III sess.1 c.36.

[5] 47 Geo. III sess.2 c.79.

1830 as essentially courts for the recovery of industrial contractor's debts; as 'creditors courts' for industrial England and not for the rural provincial trader [1]. Travelling to the major towns of the north for redress was, apparently, too costly and too time consuming for northern manufacturers ; it proved more convenient and cheaper to have the courts set up by Lord Brougham's act locally situated. Indeed the cost of the local courts set up after 1830 in the south were, if not markedly higher, somewhat greater than those of their imitators in the North [2].

Furthermore, evidence from a survey of 139,456 cases processed in these new courts (Table 6.4 above) suggests that not only were court costs in

Table 6.4 : Distribution of the number of suits entered in local courts for recovery of small debts, 1826, by region and amount sought in recovery (percentage of total).

	Below £1	Between £1 and £2	£2 to £3	£3 to £4	£4 to £5	£5 to £10
Total	45.14	31.26	5.96	3.70	13.46	0.44
North	48.52	35.06	5.65	3.95	6.81	0
South	43.98	29.90	6.08	3.61	15.84	0.59

Source: Calculated from 'An Abstract of the Number of Suits or Claims entered in each of the Courts of Request for the Recovery of Debts under £5 in England and Wales...' BPP Sess. 1830, 23 (16),257-293*.

[1] See 'Local Courts' Legal Observer I, 1830,46; [Anon] 'Courts of Local Jurisdiction' Monthly Review 124, 1830, 168-9; 'Observer' An Estimate of Mr Brougham's Local Court Bill (London, 1830), 20; William Raines A Letter to the Right Honourable Lord Tenterden, Lord Chief Justice of the Court of King's Bench etc. etc. on the Bill for Establishing Courts of Local Jurisdiction (London, 1830), 101.

[2] Based on a survey of the costs recited in various sections of 67 acts setting up local courts between 1800 and 1847.

general higher in the southern counties of England but the amounts recovered from the defendant to a value greater than £4 were more frequently obtained in the south than in the north. In southern counties, over twenty per cent of claims were for values over three pounds; in the northern counties of England, less than eleven per cent of claims were for that amount or more. Equally, fewer than the average number of cases were brought to the new courts of record in the southern counties for amounts of less than two pounds. Infrequently were the decisions of such courts subject to review by superior courts [1] so defendants and plaintiffs alike were sheltered from the additional legal costs of further litigation.

Of course not all such courts only dealt with the recovery of debts.Only a third of the courts of request formally dealt with debt and, as we have already noted, a larger proportion of courts of record were involved in the task of recovering debts for plaintiffs than local courts of request. Nevertheless even in those courts of special jurisdiction similarly named and identified by Professor Arthurs recovery after the conclusion of a transaction appears to have been most frequently the cause of litigation [2]. Naturally commercial rather than agricultural claims predominated in all courts of request, whether principally intended - as after the Brougham act - to encourage small debt recovery or not, largely because small

[1] Arthurs 'Special Courts, Special Law', 397; idem.''Without the Law'', 131.

[2] Arthurs ''Without the Law'', 133. Based on evidence from the Bristol Courts of Requests and Conscience. The slight evidence from the Trowbridge Court of Requests [Wilts.R.O. 212[B]/35/1-3; Annual Register 10, 1768, 90] and the Court in the Isle of Wight [PRO (CL) AK 6/1] neither of which are surveyed by Arthurs, confirms the general tenor of his argument without furnishing statistical data.

shopkeepers or tradesmen with much variable capital stock in hand and consequently little wish to effectively lend to their customers could easily and inexpensively sue any late paying customer. The small amounts generally recovered in the courts for the recovery of small debts was therefore no accident; plaintiffs could sue and sue again, cheaply and successfully [1]. In the existing courts of the corporations and town councils of the market towns of the rural south, litigation tended to be for higher amounts - indeed the major share of personal actions in such courts (some 45% in fact) were for sums in excess of £200 and often reached much higher sums [2]; they also tended to be more infrequently used. In fact the courts set up for the recovery of small debts did little to provide cheap and effective means of redress for rural contractors of land. Still the bulk of those cases concerning real property went to the higher courts. One author estimated that between one third and one half of all actions in the superior courts concerned property alone [3]. Nevertheless by placing recovery from small transactions at the centre of the work of these new provincial courts, English law had effectively offered the means of redress to a court like the sessions court in the treatment of the law (broadly sympathetic to the principles of equity and less concerned with the rigid observation of the common law) whilst preserving the independence and local integrity of the jurisdiction. In the rural south,

[1] It is not possible to reconstruct the number of prosecutions per litigant for any of the courts because of the lack of any common system of reference for the names of appellants.

[2] Calculated from 'First Report of Commissioners appointed to Enquire into Municipal Corporations of England and Wales...' BPP Sess. 1835, 23 (1), 116 ff.

[3] 'Practical Dissertations on Conveyancing No.1. Directions for the study of the Laws of Real Property ' Legal Observer 1, 1830,33.

claims for amounts between those likely to be received following sessions trial and those expected in corporation court trials seem to have been most frequent. The creation of this large range of institutions significantly reduced the cost of going to law for the rural contractor.

The frequency, relative inexpense and the informality of their justice seems nevertheless to have made them mere arbitrators in small disputes and therefore not so much law-making or rule-creating institutions as the pragmatic policemen of rural contracting. Arthurs has argued [1] that their very existence suggests that innovation in contract law was largely superfluous. This would of course be true were it the case that all innovation in the law of contract after 1780 was intended to work through new and alternative institutions for the governance of contract. It might also have some validity were it the case that these new courts were set up as a part of the general revision of contract law undertaken during the late eighteenth and early nineteenth centuries. In fact institutional adaptation generally lagged well behind the common law in devising novel forms of contract supervision and the legal 'revolution in contract' was largely concerned with finding rules for the conduct of private transactions which reduced the need for any form of arbitration by courts of whatever composition. The fact that these new varieties of court alone were not required for the effective transition from low volume, costly, transaction to high volume, relatively inexpensive, forms of transaction says much for the efficiency of that alteration in legal principle.

[1] Arthurs Without the Law, Chps.1, 3-4.

CHAPTER EIGHT:PRIVATE SUPERVISION AND THE PUBLIC WORLD OF THE RURAL ECONOMY

> 'Both the protection of property and the protection of contract must be established, at least to some extent, if the mercantile economy is to flourish. They are not provided by the traditional society; but they can be provided, to what (up to a point) may be a sufficient extent, by the merchants themselves. They may join together...to protect their property from violence; they may establish rules among themselves for the verification of property rights; and they may police their contracts...This, however, can hardly be possible unless the mercantile community has already acquired some social linkage or articulation. A random collection of individuals will hardly have it' [Sir John Hicks, 1969].

In 1792 a contributor to the provincial journal The Country Spectator voiced dissatisfaction with the fashionable view of the rural scene as an idyll, a mirror-like reflection of Gilpin's gothic 'picturesque'.

> There are some who still declaim on the quiet and felicity of retirement, and who would fondly persuade us, that Astrea still inhabits the earth and that Britain has its Arcadia [1].

In reality, as the author of this frank paper showed, the influence of the metropolis was so pervasive that it influenced even the remotest corners of Britain. In the most trivial ways the influence of metropolitian London had reached the countryside - from the use of white lead in place of starch in the provinces in imitation of the beauty powders used by London ladies [2] to the emulation of London street whistles by country boys [3]. Often this influence was due not to imitation but rather to the movement of Londoners to the countryside. Their introduction of 'expensive luxuries before

[1] 'Enquiry into the simplicity of rural life' The Country Spectator 1, (1792-3), 25.

[2] 'A Caution to the Ladies against the use of White Lead as a cosmetic' The Bristol and Bath Magazine 1, (1783-4), 106-7.

[3] 'On the country imitation of London manners' The Country Spectator 1, (1792-3), 104.

unknown in the country' [1] was frequently cited as the reason for the corruption of the rural ideal. This influence of London manners upon rural society threatened to foster what William Marshall called the 'over-rated estimate of themselves' [2] which he had found among the people of the south-west of England. The apparently false sense of the worthiness of provincial society which Marshall decried was, of course, a product of social as well as cultural pretension and as such is of little concern to this study. Nevertheless, the strict division between the rural and the urban in some contemporary literature and surviving documentary evidence suggests that it was the imitative zeal of the country people of southern England that distinguished them from 'civilized' metropolitans.

Whether the result of imitation or importation, this delusion of London manners and habits was frequently assumed to have corrupted, even destroyed, the rural world. Late eighteenth century authors believed affectation of any sort among country people was ridiculous if not dangerous. Richardson's Pamela endured the seduction of her simplicity by city habits in the most popular contemporary warning to the genteel of the consequences of lost innocence whilst, in more comic style, the

[1] [Anon.] A Political Enquiry into the Consequences of Enclosing Waste lands and the Causes of the Present High Price of Butchers Meat being the Sentiments of a Society of Farmers in -----shire (London, 1785), 7. Cf. J.Matthews Remarks on the Cause of the Scarcity and Dearness of Cattle, Swine, Cheese etc. etc. (London, 1799), 25; David Young Agriculture, the Primary Interest of Great Britain (Edinburgh, 1788), 83-4.

[2] William Marshall The Rural Economy of the West of England including Devonshire and parts of Somersetshire Dorsetshire and Cornwall (London, 1976) volume I, 25. On the phenomenon of rural emulation in general, see Richard A. Kent 'Home Demand as a Factor in Eighteenth Century Economic Growth: The Literary Evidence' (unpublished M.Litt dissertation, University of Cambridge, 1969), 130-60.

Northamptonshire rural poet Clare mocked the imitative farmer's daughter

> Miss Peevish Scornful once the village toast
> Deemd fair by some and prettyish by most
> Brought up a Lady though her fathers gain
> Depended still on cattle and on grain
> She followd shifting fashions and aspired
> To the high notions baffled pride desired
> And all the profits pigs and poultry made
> Were gave to Miss for dressing and parade
> To visit balls and plays fresh hopes to trace
> And try her fortune with a simpering face
> And now and then in Londons crowds was shown
> To know the world and by the world be known [1].

The uneducated Miss Scornful finally reverts to plainer habits - because of an illness apparently induced by 'having played show woman much too long' [2] - and runs away with a farm servant. The moral of these tales of the threat to country sobriety and chastity from urban custom, along with the many others of the genre, was clear to contemporaries: the pleasures of the countryside were quite irreconcileable with those of the metropolis.

Yet in a sense that is perhaps lost to historians every provincial parishioner lived not in an imitative community of would-be metropolitans but in a vibrant and cohesive community of singular institutions and practices. The eighteenth and nineteenth century rural parish which provides the geographical focus of this study was, in the words of one of its last profound witnesses '...a miniature state and contain[ed]

[1] Eric Robinson and Geoffrey Summerfield (eds) Selected Poems of John Clare (Oxford, 1974), 76.

[2] ibid.

representatives of the chief varieties of human life' [1]. At the centre of the 'little state' of the parish and the shire town was the institution of the market and the organisational and official structures and offices associated with it. Indeed it is the unique character of these offices and their function that distinguished rural from metropolitan and urban society. It has already been stated that this essay focuses not upon the agrarian aspect of rural life, but rather upon the organisational characteristics of the market society of the parish, hundred and shire, the structure of the rural 'state' itself. Certainly the eighteenth century's own equation of the rural with the derivative explains why rural parishes so ably aped the nation state in their organisation and administration, and historians' insistence that rural communities were wholly or mainly agrarian and therefore subject to the 'agrarkonjonktur' of the long eighteenth century helps to identify the real strains upon rural institutions before 1840. Yet only the recognition of the unique qualities of rural administration, in hamlets as well as in county towns, allows the economic historian to account for the institutional change witnessed in the countryside and felt across Britain in the course of the late eighteenth and early nineteenth centuries. The distinctive institutional organisation of rural life, in other words, sufficiently distinguishes the rural from the metropolitan.

[1] Richard Jefferies 'The Future of Country Society' [1877] in John Pearson (ed.) Landscape and Labour (Bradford-on-Avon, 1979), 72. For more contemporary opinions as to the local nature of the rural 'state', see James Laver 'Customs and Manners' in Alex Natan (ed.) Silver Renaissance: Essays in Eighteenth Century English History (London, 1961), 108 ff; Basil Couzens-Hardy (ed.) The Diary of Sylas Neville, 1767-1788 (Oxford, 1950), 240.

The most consistent difference between rural, provincial, economy (including the economies of the shire towns) and metropolitan economy was the relative informality of the policing and control of contractual obligations. In the course of this and the next chapter, I want to illustrate how this had particular consequences for the transactions sector of the rural economy. In the late eighteenth and early nineteenth century two key areas of market supervision grew in importance - the unsanctioned practice of informing and the virtual privatisation of rights to weights and measures inspection and regulation. Similar developments in allied areas of rural life (such as the parallel development of quasi-private rights in corn inspection) suggest that Georgian England underwent something of a minor revolution in economic organisation in the shires. We shall suggest that in an apparent attempt to reduce the costs associated with repetitive market trading - and in the novel environment of newly privatized market rights - the rural world engineered the solution to the problem of transaction costs by rewarding private initiatives in the field of exchange supervision. We shall rely upon the (admittedly inconclusive) evidence of changing patterns of regulatory control and ownership to infer how transaction sector costs may have been reduced. Furthermore, we shall suggest that specialisation in the form of supervision and policing and the diminished role of the unpaid and voluntary personnel of the rural parish suggests a further reduction in exchange costs associated with regulation.

The principal characteristic feature of the eighteenth century parish community in relation to market trade was the relative informality of governance - partly the result of the voluntary nature of parish offices (a feature well known to historians [1]), partly the result of organisational inefficiency itself. The extent to which this informality bordered upon corruption is too well known to require much elaboration here and is evident to even the casual reader of the voluminous contemporary literature on parish maladministration. Memorable examples abound of susceptible parish officers giving way to temptation, often through bribery or other inducements - too many, indeed, to do other than agree with the Webbs' picture of the rural shires as veritable dens of vice and corruption. The Cambridge cleric James Plumtre witnessed with some surprise the poor rates of a Cambridgeshire parish being collected in a public house in 1800 [2] while the parish officers of Foxton in Leicestershire were reputed to have met under the (drunken) auspices of the local Friendly Society in 1785 [3]. In spite of the evolution of privatised responsibilities of the sort intimated below, considerable inducements had to be made to maintain the relatively inexpensive voluntary system which appeared to many contemporary commentators so riddled with inefficiency and corruption.

The revolution in parish administration that is associated with the attempted reduction in transaction sector costs in the rural world during the Georgian decades not only created new institutions; it partly reformed

[1] Especially following Sidney and Beatrice Webb The Development of English Local Government 1689-1835 (London, 1963), Part I.

[2] CUL Plumtre Papers Add. MSS. 5819 fo.16.

[3] Northamptonshire Mercury January 17 1785.

old and suspect ones. Most notably the office of the churchwarden - for long the administrative arm of the parochial executive machine of the vestry - underwent significant reform in the course of the early nineteenth century. Churchwardens were an essential coordinating part of local government, both as empowered officers of the magistracy and as local representatives of the diocesan authorities [1]. Yet the extent of their influence over the economic life of the community has often been overlooked [2]. They acted as the custodians (by law the 'bailiffs') of the funds of their church and community [3] and were treated to the privileges of other 'corporations sole' in the management of parish funds [4]. Furthermore, they were entitled to a distinctive degree of protection from prosecution for what might be regarded as 'frivolous reasons' [5]. With such unparalleled support for their work it might be supposed that the position of churchwarden was a not unpopular one and less given to the near criminal activities associated with other local parish officials. In fact, as the

[1] On their diocesan duties, not dealt with here, see Henry William Cripps A Practical Treatise on the Laws Relating to the Church and Clergy (London, 1845), 180-204.

[2] Notably following Sidney and Beatrice Webb English Local Government (reprinted, London, 1963) volume I, 21-23.

[3] Bishop v. Eagle 88 ER 607-08.

[4] Richard Burn Ecclesiastical Law third edition (2 vols., London, 1775), volume I, 378 developed the analogy between churchwardens' powers and those of corporate bodies.

[5] 21 Jac.I c.12; Lewis v. James (n.d.) reported in Edwin Maddy Digest of Cases Argued and Determined in the Arches and Prerogative Courts of Canterbury, the Consistory Court of London and the High Court of Arches (London, 1835), 101. From 1837, proceedings might only be initiated against churchwardens where they had been 'wilfully disobedient'. See Millar and Simes v. Kelby and Palmer cited in Alfred Waddilove A Digest of Cases Decided in the Court of Arches, the Prerogative Court of Canterbury, the Consistory court of London and on Appeal therefrom to the Judicial Committee of the Privy Council (London, 1849), 118.

Webbs pointed out in their magisterial study of the offices of shire and parish, churchwardens absconded with funds or cheated their fellow parishioners as frequently as other parish officials [1]. Furthermore, church and civil courts not infrequently dealt with cases in which those liable to serve as churchwardens sought to escape the office or be declared exempt before both the civil and ecclessiastical justiciary. During the late eighteenth and early nineteenth centuries a large number of deliberate exemptions from service in the office were sought on the basis of customary practice [2] and, for the first time, a number of appeals on the grounds of local practicability and necessity came before the courts [3]. As an unpaid office - even fees were only paid until 1778 [4] - the churchwardens post was not only unpopular, it was actively despised and avoided. Following the notorious contemporary case of Dr. Beavor of Norwich in 1789 - whose refusal to serve brought his case before Doctors' Commons

[1] Webb English local Government, I, 64 ff.

[2] According to Canon 89 of the Church, the obligation to serve might not generally be challenged upon the basis of local custom. However, an increasing number of exemptions of putative customs of appointment followed judgment in Middleton v. Crofts 26 ER 708-802 and the London customs allowed under Stephenson v. Langston 161 ER 588-90.

[3] For example, Peers, clergymen, MPs, barristers, attornies and court clerks had already been given on the basis of custom and exemptions allowed by statute allowed for dissenters (1 Will & Mary c.18 ss.4,7) and physicians (32 Hen.VIII c.40). New exemptions to emerge in the course of the eighteenth and early nineteenth centuries included surgeons (18 Geo.II c.15); apothecaries (6 Will. III c.4); those who had prosecuted felons (10 & 11 Will. IV c.23); militiamen (2 Geo.III c.20 , 42 Geo.III c.90 s.174) and Roman Catholic priests (31 Geo. III c.32 s.8). The exemption for aldermen confirmed in Rex v. Abdy (71 ER) was later rescinded (Annual Register 29 (1782), 125). This account of the growing volume of appeals for exemption is based on reconstruction using statutes of the period and the (often unreliable) contemporary guides by Burn Ecclessiatical Law, 369-70 and John Paul The Parish Officer's Complete Guide sixth edition (London, 1793), 17.

[4] Until 18 Geo.II c.19. See also Times 15 April 1790.

[1] - there appears to have been some reappraisal of the function of local and parish officers, leading to a greater willingness in Norfolk to make available 'oaths of ineligibility' in Norfolk within two years [2]. How widespread such reluctance to serve was is very difficult to ascertain, yet throughout the late eighteenth century significant resistance to the traditional duties of parish officers emerged and, in the most implacable opposition to these unpaid duties of all, churchwardens appear to have finally thwarted attempts by the shire justices to have them administer the settlement laws of Elizabeth in relation to vagrants in 1787 [3]. The diminution of the churchwardens statutory and customary obligations which followed is testimony to the growing specialisation of administrative power placed, not in the hands of efficient paid officers as the Webbs believed but, as we shall see, in the hands of private individuals with personal interests in the economic regulation of parish trade and commerce or the newly formed constabulary forces [4]. The fact that, at the end of the

[1] Times 7 November 1790.

[2] Norwich Chronicle 21 July 1792.

[3] William Man Godschall A General Plan of Parochial and Provincial Police (London, 1787), 7. At least one commentator saw this as an assertion of the independence of the unpaid volunteer administrators from local government, Northampton Mercury 17 February 1787. Cf. Part of MSS. dissertation on the duties of parish officers, [?1800], J.P.Morris MSS., Wilts.R.O. 317/29, where churchwardens exemptions are hardly mentioned.

[4] On the reduction in their statutory and civil powers, see subsequent editions of Godschall General Plan and on the reduced role of the churchwarden in ecclesiatical matters, see Humphrey Prideaux Directions to Churchwardens for the Faithful Discharge of their Duty ed. Robert P. Tyrwhitt, eighth edition (London, 1830), 17. Only one altering statute adding to churchwardens' responsibilities before 1840 is listed in Henry Riddell and John Warrington Rodgers An Index to the Public Statutes from 9 Hen. III to 10 & 11 Vict. Inclusive (London,1848), 32-3.

Georgian decades, churchwardens were effectively only policing the older, Tudor, parish laws resulted from the attempt to economise on regulatory and supervisory costs through the privatisation of those powers churchwardens had found most irksome. In the rest of this chapter and the following one, it will be demonstrated that, in relation to two particularly important forms of market supervision, the Georgian shires conducted a virtual revolution in administration through the specification of property rights in supervision - a revolution whose scope was greater than is indicated alone by the two, detailed, illustrative cases given here. The newly created rights in supervision meant that supervision remained largely informal - in contrast to the more formal supervisory practise of Victorian England - but significantly diminished in effectiveness and efficiency. The rise of the professional informer in the rural south and the development of private rights in weights and measures supervision (which will be described in the next chapter) together ensured the continuance of that market informality which characterised Georgian rural economic administration.

Of all of the many forms of defining and preserving property rights the definition of common standards for the exercise of property transfer and for formalised exchange is perhaps the most common in history. The definition of unique weights and measures or standards for products sold in the market for example empowers those who regulate trade and diminishes the potentiality for 'shirking' behaviour or plain illegality by traders. On the one hand it protects all parties to a bargain from the insecurity of unspecified transactions and on the other hand it affirms the power of the owners of trading sites and associated rights to define the legitimate form

of trade in the confines of the market itself. The specification of simple contracts of the sort routinely undertaken every day in the provincial markets of southern England during the late eighteenth and early nineteenth centuries naturally incurred substantial costs, but the form in which weights and measures regulation was undertaken ensured that those costs were minimised where possible. Just as the prescriptive rights to market toll were sold or rented to those willing to subcontract the running of the market, so too alternative institutional arrangements were established by which lucrative private rights in the specification of market standards were created and administered with the agreement of local and central government and with the intended benefit of reducing the costs associated with market trade. For most of the period that is the focus of this essay this quasi-official institution of the inspectorate was responsible for the maintenance of just and equitable market transactions, and whether appointed or self appointed sought to make a living from the transgressors of the laws of the rural economy.

The distance of years persuades us too easily of the unimportance of exact weights and measures and honest market trading but at the beginning of the period the toleration of illegal weights and underweight products was hardly countenanced. By the end of the Napoleonic Wars nearly one hundred laws had been passed in Britain concerning weights and measures and England alone had more than two hundred different types of customary weights and measures in use [1]; few of these many regulatory laws had apparently

[1] Patrick Kelly Metrology: or An Exposition of Weights and Measures, chiefly Those of Great Britain and France (London, 1816), xv; George Skene Keith Different Methods of Establishing an Uniformity of Weights and Measures Stated and Compared (London, 1817), 2.

achieved the desired effect for abuses abounded. Yet, according to one contemporary commentator,

> ...although the laudable endeavours of Parliament for so many years had failed of complete success, yet they were highly useful in preventing new irregularities. The wear indeed of weights and measures, the avarice of dealers, and the ignorance of artificers, especially in constructing measures of capacity, contribute to increase that diversity which requires the constant vigilence of the magistrate to prevent [1].

Only through an effective system of surveillance and control was it likely that 'irregularities' in trade would be prevented and, in spite of frequent and ingenious attempts to devise complete systems of weights and measures for Britain based upon a common standard with worldwide application [1], it is this approach to the problem of ensuring a continuity of market standards that influenced late eighteenth and early nineteenth century. Weights and measures regulation was indubitably a moral problem and not a scientific one. At the heart of the issue lay the problem of regulating not the product of farmers and the goods of market traders but the market itself. Fear of the effects of monopoly - of product and of market information - constantly appeared in Georgian discussions of the functioning of the rural provincial market economy and detection was no less a theme for these early market economists. The exercise of control over the market trade of the nation in the essential commodities (in wheat and other grains in particular) was more than simply an emotive concern of the pamphleteers however. It was perhaps the political issue of primary

[1] Kelly Metrology, 64-5.

[2] Henry Hennessy 'On a uniform system of weights etc. for all nations' Atlantis 2, 1858, 301-329 and George Skene Keith 'Observations on the Final Report of the Commissioners of Weights and Measures' Edinburgh Philosophical Journal 6, (1821-2), 41-47 review the less fanciful schemes from the standpoint of nineteenth century measurement science.

importance for rural political society - and assuredly it was made to appear political at both the highest and the lowest level of public administration. The anonymous author who wrote in 1805 that

> The violent outcry against the great farmers and monopolisers which prevailed three years since [following the dearth of 1801], was raised by the daemon of jacobinism as the precursor of an outcry against property and distinction [1]

was not alone in regarding any criticism of English market conditions as overtly threatening to the political stability of the nation for on both sides of the question of market structure the role of factors and farmers was regarded as primarily a political one. Sir Thomas Turton considered any thought of engineered market inefficiency through combination '...most dangerous...' [2] whilst in strict opposition to the so-called 'monopolisers' Septimus Hodson described the effect of their control of prices as 'malignant' [3]. The provincial politics of market malpractice exercised many writers during these years and most if not all characterised the efficient market - after Smith - as one in which information was freely available and stocks were not held off the market to raise prices in years of seeming dearth but real abundance. Yet for the opponents of the farming and trading community a conspiracy against a fair market consistently thwarted the attempt to establish fair prices for consumers in the shires. The conspiracy of the 'mealmen', the dealers and the farmers against the

[1] [Anon.] A Defence of Principle of Monopoly of Corn-factors or Middlemen and Arguments to prove that War does not produce a scarcity of the necessities of life (London, 1805), 20.

[2] Sir Thomas Turton An Address to the Good Sense and Candour of the People in Behalf of the Dealers of Corn second edition (London, 1800), 158.

[3] Septimus Hodson An Address to the Different Classes of Persons in Great Britain on the Present Scarcity and High Price of Provisions (London, 1795), 5.

rural populace raised the spectre for opponents of monopoly not of a civil war for grain but of secret cabals of the wealthy; of arrangements to 'fix' the market and preserve the ill-defined 'agricultural interest'. In the words of one of the more dispassionate critics of the agricultural interest

> The combination does not act in any fixed or marked character, but consists in a general and uniform consent to do the best they can for their own interest, however against the interest of the public; their mode of diffusing the secrets of monopoly...arranges the plan, and communicates it to all its members at once [1].

In this suspicious rural world, such cabals were regarded as exercising a fearful control over the prices and supply of essential market goods through morally dubious 'market rigging' practices. Fraudulent farmers and dealers in corn traded at low prices before the market opened, or regrated on corn, or forestalled in the market or otherwise attempted to affect the market price of corn; worst of all, farmers were known to hold onto corn in years of dearth in hopes that prices would rise yet higher. The west country cleric, John Malham, noted in 1798 that

> By these and the like IRREGULAR PRACTICES, the public are precluded from the advantages of a fair and open market and a few individuals are suffered to prescribe the terms on which that public shall be nourished and supported. The unreasonable and extravagent demand of the farmer, in seasons in which abundance and superfluity are not manifest, is submitted to by the miller or baker, without any means of investigating the propriety and reasonableness of the demand; and the community are compelled to submit to the advance, which the latter must consequently make upon the consumer, without having any

[1] George Brewer The Rights of the Poor Considered; with the Causes and Effects of Monopoly and a Plan of Remedy by Means of a Popular Progressive Excise (London, 1800), 71.Common use of the phrase 'the secrets of monopoly' or the 'arcana of trade' (Gentleman's Magazine 79, (1809), 1216) suggests that the private practices of the market trader were themselves a cause of discontent.

remedy [1].

Similar arguments were raised by others - that the formation of effective monopolistic associations of traders and producers would affect the retail prices of all goods; that the poor would starve; that crime would rise [2]. Thus one persisting theme of this critique of market imperfection was the need for some official overseeing of the determination of weights and standards and trading practices, for both traders and farmers were notoriously given to adjusting weights in their own favour and cheating the people. Sadly the critics of the farming interest regarded the available inspection system as imperfect and supposed '...that for nearly half a

[1] Revd. J.Malham The Scarcity of Wheat Considered; or a Statement of the Impolicy of the Late and Present Price of Wheat (Salisbury, 1800), 7.

[2] Among the many discussions of monopoly in the corn trade during these years, see Buxton Lawn The Corn Trade Investigated and the Shocking System Exposed (Bath, 1800); Hervey, Viscount Mountmorres Impartial Reflections upon the Present Crisis (London, 1796); Alexander Dirom An Inquiry into the Corn Laws and Corn Trade of Great Britain and their Influence on the Prosperity of the Kingdom (Edinburgh, 1796); [Dr.Blane] Inquiry into the Causes and Remedies of the Late and Present Scarcity and High Prices of Provisions in a Letter to the Right Hon. Earl Spencer KG. (London, 1800); [Anon.] Live and Let Live A Treatise on the Hostile Rivalries between the Manufacturer and Landworker (London,[1787]). Often these and other similar pamphlets deliberately confused 'swindling' with 'monopoly', a habit of mind not uncharacteristic of the last two decades of the eighteenth century as a whole (M.S.Servian 'The Fair Swindler of Blackheath, a Case Study on the Importance of Reputation in Late 18th Century Legal and Commercial Affairs' Journal of Legal History 8, (1987), 79). Equally common was the confusion of regrating on corn with monopoly power (see, among many such pieces, Gentleman's Magazine 66, (1796), 102-3), a point recognised by the farming interest in reply to calls for tighter restriction upon market sale of grain in times of scarcity (for example, in Rowland Hunt A Word On The Times To Those Who Buy: Also Five Minutes Advice Before Going To Market To Those Who Sell [second edition] (Shrewsbury, 1800), 9-10; 'Common Sense' The Cause of the Present Threatened Famine Traced to its Real Source viz. to the Actual Depreciation on our Circulating Medium, occassioned by the Paper Currency (London, 1800), 7-8; [Review of Hunt] Gentleman's Magazine, 74, (1804), 949-51).

century the magistracy have been blind fools...'[1]. At local level the practices of these supposed exploiters of the needs of simple families were unpopular and regarded as devious enough to evade detection unless the strict rigour of the law was applied against them in the matter of weights and measures regulation. Two forms of institutional adaptation reflect the desperate need for some form of active policing of market infractions by traders. On the one hand, the voluntarism characteristic of Georgian provincial economy allowed community policing by the unpaid and partly paid officers of the parish or town; but on the other, newer forms of surveillance emerged which depended upon the capacity of that economy to permit opportunistic action in situations where property rights were not fully enforced. These latter institutions - of informer and inspector - both benefited in this regard from the relative inefficiency of the market economy of the late eighteenth and early nineteenth century. Neither of course were wholly novel institutions, but in their intensity of use, their almost 'professional' ethics and their highly organised state, they came to represent new forms of privatised market control through liability rules in the absence of fully enforced property rights.

To speak of informers and the practice of informing as an essential element of the rural regulatory regime appears at first to confirm the hypothesis - foreign to our argument - that property rights in the rural communities of the agricultural south remained unprotected and unpoliced. In fact the lack of centralised regulation in market society meant that private access to the benefits of unofficial regulation was possible. One

[1] James Naismith An Examination of the Statutes now in force relating to the Assize of Bread (Wisbech, 1800), 7.

consequence of this, and of the opportunism consequent upon the separation of monitoring functions and ownership, was the creation of a decentralised 'market' in monitoring services. An extension of informal rural institutions, these decentralised, atomistic, elements of provincial market regulation included professional informers. In London, the work of the informer seems to have been largely concerned with the detecting of infractions of the trades of artificers and the services of an urban metropolis and there appear to have been very few or no gangs of informers of the kind regularly turning up in the pages of provincial newpapers, sessions papers and other records [1]. There, the problem of surveillance was principally one of discovering from a large number of traders which individuals were regularly infringing not only national law but also that metropolitan law which became such a feature of the Georgian legislation intended for the protection of property. In the countryside, however, the problem was of a different order. Property rights in trade were more clearly connected with the elementary trades of baker, butcher and so forth. Whilst in London much of the activity of the informer was dedicated to apprehending those found infringing lottery rules [2], in the countryside most of the informers' time from the very beginning of our period appears to have been devoted to the detection of underweight bread, false reeling of yarns, the selling of gloves without authorized stamps and

[1] Sir Leon Radzinowicz A History of English Criminal Law and Its Administration volume II (London, 1956), 142-155. There is no comparable account of the use of informers in provincial Georgian England.

[2] ibid., 148-150.

the selling of wool in unmarked bags [1]. In all but two cases neither formal nor even informal internalised forms of monitoring precluded such opportunistic action [2]. On whatever occasion informers sought to place information in the hands of the courts, their actions appear at first inspection to suggest that rural regulation - like police and government - was ill coordinated and therefore necessarily inefficient. Yet the act of laying an information, whether at the quarter sessions or with the constable, constituted at once the most inexpensive form of control over the economic activities of traders and the greatest threat to the integrity of the common law. The cost of cheaply policing the rural south and protecting the legality and fairness of transactions appears to have been the encouragement of doubtful methods by shady and unscrupulous individuals. In the somewhat untypical contemporary opinion of an anonymous contributor to the radical Norfolk journal The Cabinet (notorious for its opposition to the game laws and their rigorous enforcement by the assize):

[1] e.g. Salisbury and Winchester Journal 8 June 1789; ibid. 10 Oct 1794; ibid. 2 July 1790; Felix Farley's Bristol Journal 2 July 1790; Northamptonshire Mercury 24 January 1785 and other cases cited below. It is of course impossible to tell how frequently the professional informer took advantage of each of the pieces of legislation covering these items.

[2] The cases in which internalised monitoring arrangements were prepared was in relation to the false reeling of yarn and the stamping of gloves; inspectorates were variously established in the late eighteenth century by traders or merchants but appear to have failed to survive. John Styles 'Embezzlement, industry and the law in England, 1500-1800' in Maxine Berg, Pat Hudson and Michael Sonenscher (eds) Manufacture in town and country before the factory (Cambridge, 1983), 196; A. Temple Patterson Radical Leicester: A History of Leicester, 1780-1850 (Leicester, 1954), 224. The Associations for the Prosecution of Offenders - about 1000 in number by the mid-nineteenth century - were by definition intended to catch felons (Douglas Hay 'Controlling the English Prosecutor' Osgoode Hall Law Journal 21, (1983), 172) and are consequently ignored in this essay.

> ...the wretch who gains a livelihood by enforcing obedience to laws which are pernicious, or useless, is exposed to the utmost contempt, whether he feeds upon the game laws, or the stamp duties; whether he levies a penalty upon the weaver of tucks, or cloth buttons [1].

The seeming paradox of the position of the informer in the economy of the late eighteenth century was precisely that he made his living from the existence of bad laws, and therefore illustrated the inadequate nature of contemporary regulation, and yet engaged in the ruthless exploitation of his fellow citizens' incomprehension or avoidance of the law. This ambiguity in the position of the informer - at once the hero and the villain of the rural trading world - is reflected most accurately in the contemporary discussions of particular cases of informing. Informing, it should be recognized, was something of a minor industry in the rural world and in an economic system dominated by informal, relatively inexpensive regulation 'professional informers' were free to take advantage of the high transaction costs implied by the existence of so many varied laws regulating trade by virtually transfering property rights in informing to themselves. Newspapers seem to have supported the laying of informations during years of dearth and consequent high prices - many public informers revealed that their neighbours were selling fine flour during the months of virtual famine in 1795 and 1801 - but opposed routine informing by those seeking to profit by the reward often given for successful prosecution in a wide variety of regulatory cases at the quarter sessions. The 'professional informer' (one newspaper called them 'domestic spies' in order to heighten

[1] 'H.C.R.' 'On the essential and accidental characteristics of informers' The Cabinet 1, (1795), 286. Cf. Patrick Colquhoun A Treatise on the Functions and Duties of a Constable (London, 1803), 56-7.

the sense of popular disgust [1]) was the object of censure throughout the period in the rural communities of the south of England.

Of course the majority of informations brought before the courts were entirely routine, the result of infringements discovered in the course of trade and made known by customers and occasionally by fellow traders [2]; rarely was monetary reward the major consideration in deciding to inform upon traders in these circumstances. When eleven of the baker William Scarbrow's customers laid informations against him before the Huntingdonshire sessions for selling underweight bread it was with the expressed intention of reestablishing the regular supply from the baker upon a fairer basis to his customers and not to penalise him or seek recompense for underweight bread [3]. Rival traders as well as customers often made allegations against each other when quite other motives were evident (revenge featuring most frequently among the reasons given for supporting prosecution). One Bath baker, for example, laid informations against her fellow traders having been fined herself for selling underweight bread and '...knowing that others broke through the Act of Parliament...' regulating the sale of bread [4]. Numerous similar prosecutions were recorded during the period by traders anxious for revenge

[1] Huntingdon, Bedford, Cambridge & Peterborough Gazette 18 January 1817.

[2] Numerous instances can be found, but see ibid., 12 July 1817; ibid., 6 May 1820; Salisbury and Wiltshire Journal 8 June 1789; idem. 10 October 1794; Northamptonshire Mercury 24 January 1785 for examples.

[3] Notification of informations in conviction of William Scarbrow, 7 February 1795, Huntingdonshire Q.S. Papers, Box II bundle 3, Hunts.R.O. HCP/1/2.

[4] Berrow's Worcester Journal 8 October 1801.

or to widen the regulatory net by catching known malefactors [1] but even the most malicious acts of informing by peers in trade cannot have engendered the same degree of fear and hatred that the work of the professional informer created.

Informers of the professional variety were numerous, apparently well known and seemingly ubiquitous. Contemporary warnings of the arrival of professional informers were common and usually took a form similar to that recorded in a south Midlands newspaper in 1803:

> Farmers would do well to be on their guard against a set of informers, who are now traversing the country, for the sole purpose of lodging complaints against all persons using five horses in their teams on the turnpike roads [2].

Those involved in the baking trade were most frequently the subject of the informations brought to the courts by these professional travelling 'spies' since informers often laid several informations against several bakers at the same time. In support of their petition for a similar regulatory regime and weight 'allowances' as were granted to the London bakers, the committee of provincial bakers formed in 1813 to make representations to Parliament cited a number of cases of devious and nefarious informing practices which, they claimed, had become all too common in the provincial rural towns. Refering chiefly to those cases involving the notorious contemporary informing 'team' of Johnson and Benwell the bakers offered eight examples of dubious, untrue or unconvincing allegations made against them by these

[1] e.g. Huntingdonshire, Bedfordshire, Cambridgeshire and Peterborough Gazette 23 November 1816; ibid., 22 March 1817; Salisbury and Wiltshire Journal 24 April 1788; ibid., 8 April 1793.

[2] Northamptonshire Mercury 2 July 1803. On this form of informing, see also Felix Farley's Bristol Journal 6 June 1795 and Salisbury and Winchester Journal 11 July 1799.

two professional informers. One example will suffice to illustrate the hostility of the bakers to the informers and their method of bringing prosecutions:

> Mr Elum, Baker, Hammersmith, sold 6 Quartern Loaves to the same Informers [Johnson and Benwell] and being told who they were sent his Daughter about 12 years of age to follow them, she returned home and informed her Father they had gone to the Goat Public House. Mr. Elum immediately went to the said House and on entering it was informed by a person belonging to it that the Informers were making a good thing of it today in the Kitchen, where he saw his own bread and 40 more loaves - One of the informers in the act of fleecing a Loaf, and from the quantity of pieces of Bread which he saw on the Table he is sure there would not be less than three to four pounds weight. In consequence of this discovery Mr.Elum was not summoned [1].

Benwell and Johnson were among a number of similar teams of professional informers who made a living out of providing evidence to the courts for the prosecution of bakers in the provinces [2]. Operating without the sanction of the law and almost always without authorized warrants for seizures the informers defeated the aim of legal enforcement - by making it arbitrary - and effectively took the powers of regulation in rural communities away from the rural constabulary. Yet this organisational framework for detecting illegality in trade was not at all inefficient. In fact the separation of surveillance and prosecution by encouraging informers - however indirectly - probably reduced local market transaction costs. If individual informers were willing to police and prosecute negligent traders

[1] PRO (Kew) H.O. 42/132/435-7.

[2] 'Report of the Select Committee on the Petitions of Country Bakers' BPP Sess. 1818, 9 (345), 232-5. On other gangs see in particular Times July 17 1786; ibid. November 6 1822; Felix Farley's Bristol Journal July 30 1791; Berrow's Worcester Journal June 30 1803. Dating the arrival of the 'professional gang' is dangerous given the paucity of central records relating to them, but experience of newspaper reports suggests that they arrived in number and as a problem in the 1780's and early 1790's rather than later or earlier.

in expectation of a reward, and that reward was to come from the penalty paid by the refractory trader, the use of even professional informers could prove economically efficient for the parish and the county. On one occasion indeed there is a suggestion that informers were even directly 'employed' by the parish to catch the illegal trader [1]. Rarely were informers open to any personal risk from prosecution, for none of the relevant statute law of the period included penalties for false information or for wrongful statements against rural traders. Only in one, probably unique, case were informers exposed to any personal liability from false information laid before the courts: the infamous and previously mentioned Johnson - one of the most notorious of the home counties informers of the period - was personally warned by the Legal Observer in 1830 that, because of poorly drafted legislation, penalties and not rewards would be divided equally between informers and the poor of the parish where illegal entries in the parish registers were reported and that, as a result, an informer could be expected to serve a term of seven years transportation as a result of the miscreance of others [2]. This single exception only strengthens the validity of the general case that informers could not lose in submitting their evidence to courts; indeed the only possible action against them following the failure of their evidence to bring a conviction - short of a personal action brought by the accused tradesman - was to be tried as a common scold or slanderer, both parts of the medieval common law

[1] i.e. in Hull. Felix Farley's Bristol Journal 6 June 1795. Some large boroughs, like Newport in Monmouthshire, maintained rewards for informers as part of their ordinances (Brynmor Pierce Jones From Elizabeth to Victoria. The Government of Newport (Mon.) 1550-1850 (Newport, 1957), 58) as did other national quasi-official bodies like the Board of Excise.

[2] 'Caution to Informers' The Legal Observer 1, 3, (1830), 43.

which failed to find a precise interpretation in contemporary legal practice in the provinces [1]. With little risk to be had from false accusation and attractive benefits to be gained from the habit of informing, professional informers effectively appropriated property rights in surveillance and the policing of trade and created a new 'market' for convictions, bringing actions to court for profit and judging their success not in terms of the greatness of the detected fraud but by the size of the resulting reward.

In spite of (or perhaps because of) the efficiency of this 'market' in criminal prosecution the communities of the rural south of England reacted strongly to the idea of government by informer and of justice by paid witness and several professional informers appear to have suffered physical injury or molestation at the hands of angry crowds or indicted individuals [2]. After failing to gain the expected conviction of one Mr. White of Gloucester, one informer '...was followed by a considerable mob, who pelted him with mud and dirt to such a degree, that he was completely disfigured' [3] and was subsequently discovered to have had plans to lay similar informations against traders in Worcester, Tewkesbury and other parts of

[1] e.g.Quarter Sessions proceedings book, 1800-1808, Hunts. R.O. HCR box 16, bundle 2, entry for 7 April 1807. Trials for 'conspiracy' among gangs appear infrequently throughout the period (e.g. Times 6 November 1832). However, it may be no accident that the only case of a conviction for false (market) information I have found is of a hawker in Cambridge, Huntingdonshire, Bedfordshire, Cambridgeshire and Peterborough Gazette June 6 1818.

[2] e.g. Annual Review 18, (1798), 184; Bath Chronicle 29 December 1808; PRO (Kew) H.O. 40/18/37; Radzinowicz History of English Criminal Law, 152.

[3] Berrow's Worcester Journal 6 September 1810.

the Severn valley. After all, informers were notoriously dishonest themselves and frequently double-dealing in their relations with both the courts and their victims. When two innkeepers were convicted of having received poached hares from local poachers at Honiton and Cullompton in Devon, it was the poachers who informed the constables of the illegal purchases of the two publicans [1] and when a Salisbury butter factor was prosecuted on the basis of an information it was commented that he himself was '...a noted swindler...' [2]. Clearly some of the unpopularity of the local informer was transferred to the 'professional' but few local and occasional informers were so severely abused save, as we shall see, in selected instances.

Professional informers were not alone in being so abused and it is clear that even those whose duty it was to bring illegal practices to the attention of the magistracy where they required investigation and possible prosecution suffered from the popular censure of traders and community alike. This apparent rejection of local supervision of the standards of trade - which must have been in the interests of all - suggests that the rural communities of the south believed there to be no need for any form of regulatory control or supervision.

[1] Salisbury and Winchester Journal 14 November 1791.

[2] ibid. 24 April 1788. (Popular censure was not, of course, reserved for informers but rather imitated that meted out in often violent form to more adventurous perjurers who regularly sought to gain from the conviction of felons; for contemporary examples of crowd sanctions of this type in England, see 'Remarks on the Punishment of the Pillory' Edinburgh Magazine or Literary Amusement 48, (1780), 71-73).

A more detailed examination of contemporary complaints reveals, however, that in the main contemporaries objected to the manner in which regulatory supervision was practiced and had some difficulty in recognizing any distinction between the 'professional informer' and the constable in the matter of informing. Inspectors of corn markets came in for much complaint and hostile opposition and were regarded as little better than paid informers because they gained at least a part of their salary from the courts in the form of rewards for successful prosecutions before the reforms of market administration in the first half of the nineteenth century in the weights and measures legislation applied outside of London. Attacks upon inspectors were not infrequent. One north Devon inspector received the following memorable threatening letter in 1812:

> Having seen a paper stuck up in this Town about some man being fin'd at Bideford for selling a Certain Measure and you we the poor understand was the informer, let me intreat [sic] you to be causious [sic] for depend upon it Winter Nights is not past [sic] therefore you person shall not go home alive, or if you chance escape the hand that guides this pen lighted match will do eaqual [sic] execution [to] your family. I know not But the whole shall be enveloped in flames [.] your Carkese [carcass] if any part shall be found will be given to the Dogs, if it Contains any Moisture for the Animal to Devour it.beware of your cattle in the field for depend upon it Nothing shall be wanting to bring you to destruction [1].

Another chilling note, written in another hand and sent to the hapless inspector pointed out that '...bets are 10-to-1 you are not in existence three months longer' [2]. Inspectors of the Corn Returns and the local

[1] 'Thomas Certain' to F.Shurray, 3 July 1812. PRO (Kew) 42/121/108-9.

[2] Anon. to Skurray, 10 March 1812 PRO (Kew) 42/121/110. E.P.Thompson's interpretation of these unique survivals is somewhat different from my own because of his failure to recognize Skurray as the Inspector of Corn appointed for the district. E.P.Thompson The Making of the English Working Class second edition (Harmondsworth, 1968), 68.

officials charged with the enforcement of the Caroline weights and measures regulations and with the maintenance of the assize standards - as well as much additional legislation - of the market towns were often more directly assaulted, however, and in the few instances in which contemporary records of assaults upon them mention popular opposition to their actions in taking corn from the market or restraining traders from selling underweight or unfit items as the reason for their suffering physical assault little appears to have been done immediately thereafter to remedy the situation by town, borough or parish authorities [3]. Far from being protected, indeed, the constables and - to some extent - the churchwardens were expected to police any disturbance subsequent to the seizure of illegal goods in the market and were often embroiled in virtual riotous disputes concerning the confiscation. Clearly informing was easily confused with voluntary community regulation - and with good reason. When legislation was forthcoming in an attempt to regulate weights and measures, it did little to reduce opportunism through a consistent assignment of market rights in surveillance and inspection. As we shall see, Parliament in fact chose to externalise surveillance and policing and created new rights in market supervision which were, apparently, entirely inconsistent with public policy. In relation to weights and measures regulation, public opinion played some part in securing the relatively independent but

[1] e.g.Cambridgeshire QS Minute Books , entry for 13 July 1804, Cambs. R.O Q/SO/11 fol. 282; Bath Chronicle 29 December 1808; PRO (Kew) H.O 42/87/366-368; N.W.Surry and J.H.Thomas (eds) Portsmouth Record Series Book of Original Entries (Portsmouth, 1976), 3, entry for 18 December 1731. One contemporary commentator noted that, in Herefordshire in 1819, 'If any police-officer be exemplary and active [in discovering pilfering or other market offences], they do not feel sorry even if he is murdered'. George Laurence Gomme (ed.) The Gentleman's Magazine Library: Manners and Customs (London, 1885), 18.

opportunistic agency of the Georgian inspectorate, an inspectorate which in all but name was an ill organised and uncoordinated club of private individuals whose position as the external agents of the rural 'state' prolonged their independence in action and responsibility to their own benefit and to the cost of the community as a whole.

Again, the historical evidence available to us cannot conclusively prove the existence of planned (and achieved) reductions in transaction costs as a result of the changing pattern of regulation through the reformed Inspectorate. Rather we have had to infer from indirect evidence of the performance of pre-existing organisational forms how virtual 'privatisation' affected the costliness of market operation. Just as the legal evidence of cases proved insufficient conclusively to validate the claim that legal reform actually reduced transaction costs - and instead we had to place some reliance upon inference - the relative spareness of historical data in relation to regulatory practise similarly forces us to rely upon conjecture based upon non-quantitative data. These reservations should be born in mind, for no amount of archival research is likely to reduce the significant role that inference from the evidence of organisational performance must play in accounts of the transaction cost considerations affecting the English rural economy in the late eighteenth and early nineteenth centuries.

CHAPTER NINE: THE REGULATION OF MARKET CONTRACTS, 1780-1840 : WEIGHTS AND MEASURES.

> 'Personalized exchange in simple, unspecialized societies depends for enforcement upon behavioural codes, and the perceived legitimacy of the contractual relationship significantly influences judges and juries. If measurement were perfect and the judicial process precisely awarded the 'correct' amount of damages to injured parties in a contract violation, then opportunism would not play the part that it does in influencing economic organisation' [Douglass C. North, 1981]

To suggest that the continuing influence of informers in industrialising Britain reflects the pertinacity of older forms of customary market behaviour is surely to miss an important phenomenon of the late Georgian years in the rural world. While there are no absolute statistics for the number of informations levied during the period, nor even for the indictments of informers themselves for slander, that might tell us in more detail how far informing had become a more common practice, the more frequent references in the ephemeral literature of the period to the roving gangs of informers and their professional attitude suggests that the creation of unpoliced private opportunities in public market activity for supervision was becoming a more productive and lucrative occupation in the rural towns. In the meantime, quasi-hierarchies were established for the internal regulation of unpopular monopolistic practices, the most heinous of which - regrating - produced at the height of the popular hysteria and the riots of the southwestern and eastern counties a range of palliative measures designed not to replace informers but to augment the effectiveness of detection. Fines, the prohibition of advertisements and sale of wheat

in the barn, rewards for information and other devices were used throughout the mid-1790's to secure effective reductions in regrating and engrossing [1]. Committees of sessions regularly insisted upon vigilance from the constabulary and rewarded active policing, but apart from reaffirming local opposition to local opportunism these efforts achieved little.

Throughout the 1790's constant efforts were raised to force parliament and the courts to admit the important role of weights and measures regulation in preserving the interests of the consumer. Finally the necessary support was given to the Caroline statutes in a case before King's Bench. In 1791 it was the Isle of Wight justices who brought before the superior court a case intended to determine whether farmers' and traders' customary measures were, in fact, legal; the case of Rex v. Major [2] was widely regarded in fact as a significant victory for the cause of reform. At the end of the case, the Salisbury and Wiltshire Journal noted the significance of the decision.

> The total abolition of customary or arbitrary measures and the introduction of one equal and general measure for the sale of corn throughout the kingdom, so long desired, will probably soon take place, in consequence of a late unanimous judgement of the Court of King's Bench on that head. This matter was about a year since taken up by Messrs. Holmes, Barwis, Rushworth and the Rev. Dr. Worsley, four Justices of the Peace in the Isle of Wight, who uniting with the respectable number of opulent farmers of that county, entered into a subscription to withstand the combination of corn buyers and prosecute

m:1

[1] From a long list, see for example Salisbury and Winchester Journal 8 May 1797; ibid. 6 November 1796; Felix Farley's Bristol Journal 18 April 1795; ibid. 7 May 1796; ibid. 11 June 1796; ibid. 27 August 1796; Berrow's Worcester Journal 10 April 1800.

[2] 100 ER 1282-1283 (1792)

> the business to effect, which they have now happily accomplished, though at an expence of near 3000 l. [1].

In the decision of the court, Bearcroft J. argued that buyers would be incriminating themselves if forced to admit to having bought by non-standard weights and on this interpretation of the consequences of a contract between buyer and seller in unregulated measures the case turned. Kenyon, C.J., argued further that none of the subsequent cases admitting the possibility of local measures were contrary to the principle of the Caroline statutes. In essence the case law of weights and measures after 1792 was placed upon a surer footing by a careful, not a revolutionary, court. Only in 1826 was any alteration in this general formula adopted at common law; only then were even the most well established customary weights admitted to market trade by the courts [2]. Rex v.Major accomplished in a few hours what had been demanded for more than a century. The following year one of the judges in the case, Lord Kenyon, reflected that '...after the case of Rex v. Major was decided, we had an opportunity of knowing from the grand juries in different counties that the decision gave great satisfaction' [3]. In the provincial market towns of the south, the decision was received with equal enthusiasm and even the farmers and dealers recognized the value of assured measures. In Andover

> ... the statute measure was not only universally adopted by the farmers, but chearfully [sic] acquiesced in by the dealers, who were convinced that great benefit will result to the public therefrom; and in many numerous

[1] Salisbury and Winchester Journal 25 June 1792. Cf.Times 25 August 1792.

[2] Tyson v. Thomas 148 ER 350-354 (1826). The judgment was naturally welcomed by the farming community. See, for example, 'News of Agriculture, Rural Economy etc.' British Farmers' Magazine, 1 (1826-7), 264, especially the comments of Jehosophat Postle.

[3] Rex v. Arnold 101 ER 197-199, Kenyon C.J. at 199.

companies 'permanence to the new measure' was toasted in bumpers [1].

Support for the common law court's decision, whilst probably not absolute, appears to have been considerable and in the great grain markets of Salisbury, Warminster and Devizes in Wiltshire and Dorchester in Dorset it was the farmers who began subscription schemes to pay for the prosecution of those found using illegal weights after the decision became known [2]. It took Parliament more than a year to catch up with the common law and local, voluntary, practice and it was only in 1794 that the statute law finally accorded with the local practice of market surveillance and prosecution through local funding. From 1794 sessions were required to appoint, at their own expense, an inspector of weights and measures responsible for the regulation of all measures used [3].

Against this background of the national coordination of weights and measures supervision the continuation of local practices and procedures for supervision after 1794 suggests that the national control over contracts in markets remained unsatisfactory at least until the legislative reforms of

[1] Salisbury and Winchester Journal 10 October 1792. Cf. Cambridgeshire Quarter sessions Order Book, 1786-96, Cambs.R.O. QS/SO/9, entry for 5 October 1792.

[2] Salisbury and Winchester Journal 8 April 1793; Felix Farley's Bristol Journal 18 July 1792.

[3] 35 Geo. III c.102 s.2.

1824 and 1835. As we shall see, the continuing independence of sessions appointees and borough inspectors from a national standard of practice produced great inequalities in weights and measures specification and enforcement. The local power over the enforcement of the existing legislative controls was often transferred to borough corporations or courts of common council by acts of Parliament, or by the transfer of prescriptive powers over the market. Whilst the Corporation of Chichester had kept control of weights and measures before the passing of a market bill in 1807, that bill effectively transferred such powers to the new market authorities [1]; similarly at Saxmundham in Suffolk the committee organising the new market in 1836 wanted the control over the weights and measures to pass to them adding that '...the Committee shall have the power of making bye-laws from time to time, for the regulation and management of the establishment...' [2]. With the control over the major markets passing out of the hands of individuals and into the hands of corporate bodies and groups of local investors, it is not unreasonable to expect that the control over weights and measures regulation in rural communities would have been subject to similar forces. Indeed control over those very aspects of regulation allowed and encouraged those very corporate bodies to specify precisely the return from prescriptive rights ownership they might expect

[1] 47 Geo. III c. 84 s.10 (1807).

[2] 'Prospectus for Enlarging and Improving Saxmundham Market' [1836], Suffolk R.O. (Ips.) HA 34/50/21/6.1(b). This document is also reproduced in Joan Thirsk with Jean Imray (eds.) Suffolk Farming in the Nineteenth Century [Suffolk Records Society Volume I] (Ipswich, 1958), 158-160. Cf. 'Copy of Address...' [1836] HA 18/EF/1 where a detailed account of the administration of the market after the transfer to the committee is given. Other markets followed similar patterns of administrative practice, for example Kingston-upon-Thames in Surrey (Surrey R.O. KB 19/1/1) and Marlborough in Wiltshire (Wilts. R.O. G 22/1/202).

and to allow them to exercise considerable control over the volume of market trading. These rights were, however, of little worth in themselves for whilst the specification of the standards of weights and measures lay in the hands of the national government, the local owners by prescription might only enforce those standards. The provision of specified standards for market trade was certainly not profitable in itself for the owners of markets and consequently, as shall be illustrated, they tended to subcontract this work to others willing to gain their income from policing the market on their behalf.

Yet within the permitted area of control given to local corporate bodies and county quarter sessions, there existed some room for local innovation and control before national enforcement was made complete after 1835. Both the sessions appointees and borough inspectors were responsible for punishing offences against the Georgian statute and the common law of weights and measures. However the relative informality of control and separation of property rights from central administration that characterised other forms of local government during the period also proved to be the basis of weights and measures regulation locally. The Inspectors of Weights and Measures appointed under the Caroline and early Hanoverian legislation were to be appointed by the justices at petty sessions for their own divisions; no divisions appointed inspectors after 1797 [1].

[1] 37 Geo. III c.143 s.1 required that only those places appointed for the regulation of weights and measures under that Act should continue to employ them. Effectively, then, no new posts were created at divisional level after 1797. Between 1795 and 1797 the effect of 35 Geo.III c.102 s.7 was to allow court leets the authority to continue to appoint inspectors; this latter form of regulation was not hindered by the 1797 Act (William Marriott The Country Gentleman's Lawyer and the Farmer's Complete Law Library (London, 1808), 4).

These inspectors - who were never regarded in law as the sessions' employees but rather as nominees acting on their behalf but with a free hand - effectively controlled local supervision in their own interests, for the regulation of local weights and measures might prove to be a lucrative and not overburdensome appointment. The East Anglian gentleman Samuel Playford for one was so persuaded of the real benefits of the office that he managed to secure two appointments as inspector in two separate counties - Cambridgeshire and Suffolk - quite illegally [1].

One very obvious reason for the apparent popularity of the post was the relative assurance of a regular salary regardless of the effectiveness of policing. Yet the very fact that a substantial portion of the regular payments to such inspectors came in the form of fines or from the sale of illegal weights which were subsequently broken and melted down suggests that some portion of their regular income was expected to come from the performance of their duties. Inspectors had in fact some considerable interest in the efficient performance of their tasks. In 1834 and 1835 some 44% of the direct payments to Suffolk inspectors came from fines or from the breaking of illegal weights [2], and in general smaller but still considerable amounts of money came from the same source. In the same years in Essex, at least 37% of the payments to inspectors came from this source

[1] County treasurers accounts, Cambs. R.O QS/10/4 fos. 383-428 inter alia; Bury division, Suffolk sessions accounts ledger, Suffolk R.O. (Bury) Q/F3. Cf. B.P.Jones Elizabeth to Victoria, 149, in which one worried weights and measures inspector complained '...that the work took so much time for so little pay that he wished to resign a post which was too onerous...'.

[2] Bury division, Suffolk sessions, cash book, 1789-1827, Suffolk R.O. (Bury) Q/F1 fos. 120 ff.

[1], in Wiltshire 33% came from confiscation and fines [2], whilst in Hertfordshire the figure was 32% or more [3] and in Bedfordshire was also 32% [4]. Figures for Kent were less clearly presented and more difficult to calculate but it appears that some 38% of inspectors revenues came from capturing weights and obtaining a reward for laying an information against the guilty trader [5].

If between one third and two fifths of the income of inspectors came from successful prosecutions, it might be expected that efficient inspectors would seek to maximise the number of convictions. What appears to have happened , rather, is that inspectors - like professional informers - tried to maximize the number of prosecutions, for no machinery short of private prosecution existed for false arrest. Their own private interest in seizures and the trial of alle gedly fraudulent traders hardly appears to have encouraged a cautious attitude to their duties. In the unique town of Cambridge, in which the University 'Taxors' had the right of weights and measures inspection and of seizing stock, but not the right to fines - which ended up in the University treasury - prosecutions were less frequent and the inspections more generous; an average of ten seizures a year of

[1] Essex R.O. Q/FA b fo.42.

[2] Wilts. R.O. QS A1/155 bundle 1.

[3] Herts. R.O. QS Misc. 1777c.

[4] Beds. R.O. CTAA /1.

[5] Kent A.O. Q/GA/1/3a. The Kent sessions, like the Great Yarmouth Borough accounts, list only the fines received and one must assume that salaries remained static in order to calculate the percentage contribution of fines to inspectors' incomes. See Norwich R.O. Great Yarmouth borough MSS. C 14/4.

between one and twenty underweight loaves in the whole town seems either remarkably lenient or unprofessional, but in most cases according to the University Registrar, Joseph Romilly, 'The Bakers submit almost invariably and there has been no trial of a refractory Baker in the Court of the V[ice] C[hancellor] of the U[niversity] for 5 years' [1]. Compare this relatively quiet surveillance with that of most of the towns and divisions of southern England in which rights to the inspection and arrest of offending traders (both bakers and others) were freely transfered to a quasi-professional inspectorate. With the plain incentive to maximise their detection rate in the form of lucrative fines most inspectors - ironically perhaps given their employment - appear to have been willing to sacrifice accuracy for volume.

As a result a very considerable number of cases came before the courts in the early years of the nineteenth century, all too many of which appear to have resulted in acquittal. In Wiltshire the somewhat overenthusiastic inspector of weights and measures, William Beech, reported with avidity that '...more than two thirds of the County shopkeepers are using light weights etc. by which the poor are sufferers...' and seized two hundred illegal weights within his first month of appointment [2] and in the county of Hertford the divisional inspector Josias Johnson reported that in three perambulating inspections of the county he had summoned 150 people to

[1] Joseph Romilly to S.M.Phillips (copy), 11 March 1835, CUL University Archives MSS. T/VIII/6. The Portreeve of the Cinque Ports appears to have exercised power over weights and measures in a similar fashion. See [Anon.] A Description of England and Wales, Containing an Account of Each County (London, 1769) volume 5, 55.

[2] 'Account of a Survey taken of Division No. 2 by William Beech, Inspector...'[1840] Wilts.R.O. QS A1/155.

account for false weights after having '...thrice carefully inspected every Shop, Public House and Beer Shop...' in his division; Johnson virtually begged on the basis of this evidence not to be removed from his new position, seemingly arguing thereby that arrests and not convictions were the true sign of an effective divisional inspectorate [1]. This enthusiasm for prosecution, whether the result of over-much zeal or simply a desire for greater income from the successful conviction of refractory traders and farmers, led to only a very small number of sessions cases related in the files of the respective county sessions. In the two counties surveyed by Beech and Johnson, the criminal prosecution of offenders against the weights and measures laws never actually reached the remarkable figure of suspects they arrested and while the long mistrusted official statistics do indeed hide any prosecutions which may have taken place at the borough courts and probably underestimate the incidence of crime in the shires, both counties would have had to under-report the crime of weights fraud by a factor of ten to have validated the claims of the two inspectors [2]. Not all counties managed to exploit the personal interest of their inspectors by pressing them to accept a third of their incomes from fines. In 1820 the Quarter Sessions of Buckinghamshire appointed a 'Committee to Enquire into the Necessity of the Office of Inspector of Weights and Measures' to investigate the efficiency with which inspectors had managed to uncover the use of false weights.In fact the committee could find record of no more than nine fines for false weights paid to the County Treasurer by the local inspectors, who received no personal reward for

[1] Josias Johnson to the Marquis of Salisbury, 4 April 1844, Herts.R.O QS Misc. B96 /6.

[2] 'Tables...of Criminal Offenders' BPP Sess. 1840 37 (321), 1023.

catching those evading the law, between 1800 and 1820. It complained in that year

> ...that the said Offices have not been executed with that Vigilence and Attention which would be productive of beneficial Effects to the Public; as it may be seen on reference to the Accounts of the County Treasurer from the time of the Appointments [of inspectors] in 1800 to Easter Session 1820 inclusive, that the only Returns made to the County are, one from the Inspector of Burnham Hundred, two from the Aylesbury Hundreds, three from Buckingham Hundreds, two from Cottesloe and one Penalty from Haddenham parish - But on examining the Records it appears that various Convictions beyond those above referred to have been returned to the Sessions between those respective Periods, in which case the Produce and Penalties have not been paid into the Treasurers Hands, but which agreeably to the two last recited Acts we recommend should in future be done and a renumeration to the Inspectors or Informers made by an Order on the Treasurer - so that all Penalties levied should appear in the Treasurers Accounts [1].

In part the legislative reforms of the Georgian period meant that the efficiency of inspectors in finding false weights might actually determine some part of the levy for the county rates too. Consequently the fact that so few false weights were found in Buckinghamshire meant that little additional income was available for the county. In practice the funding of this informal system of weights and measures validation and the surveillance of local marketing was considerably complicated by considerable indecision regarding the ownership of fines recovered. The 1795 Act for the Prevention of the Use of Defective Weights required that, after conviction before the sessions justices, the miscreant trader would be punished

> ...by distress and sale of the goods and chattels of the person or persons so offending...[which were then] to be paid to the treasurer of the county, riding or division,

[1] 'Report of the Committee to Enquire into the Necessity of the Office of Inspector of Weights and Measures...', 17 October 1820, Bucks. R.O. Q/AM/8/4 fo.1.

> where the said offence shall be committed, to be by him applied towards the expences of carrying this act into execution, and the residue (if any) in aid of the general county rate [1].

Meanwhile a 'reasonable recompense or satisfaction' for the inspectors was directed to be paid out of the county rates [2]. Within two years a further Act [3] allowed the County Treasurer to recover not only fines but the Divisional inspectors' costs on their behalf - again for submission to the county rates - and allowed the county to break and sell captured weights for scrap for the first time. More significantly the same Act allowed parish, borough or hamlet inspectorates to be established (churchwardens had carried out similar duties with the force of mere custom previously) to be paid for out of the parish poor rates. At parish and at county level, inspectors' salaries and costs came from the general funds to be applied to a variety of local administrative and welfare services and yet in part their success in the apprehending of weights and measures fraud contributed to those funds.

At parish level, of course, some regular inspection system had been in place for some time. Clerks of Markets, Mayors or Churchwardens ensured that market measures accorded with local custom and that nobody was knowingly defrauding purchasers. Yet until the 1797 Act the problem of finance appeared insoluble. Local investigation was frequently regarded as

[1] 35 Geo. III c.102 s.2. (1797). The previous year the London Committee of Aldermen had devised a plan for the regulation of the wheat and flour markets by weight which appears to have acted as a model for the provincial regulation of corn and other markets in this act. See Gentleman's Magazine, 66, (1796), 962.

[2] ibid. s.4.

[3] 37 Geo. III c.143 ss.1-5.

being extraordinarily inefficient even after the enabling legislation of 1794 and in at least two counties (Wiltshire and Buckinghamshire) the sessions correspondence files reveals frequent dissatisfaction with the parish and borough regulatory system [1].

In fact local innovations in the practise of regulation were not infrequent throughout this period - both before and after the later Act. Against the background of growing discontent over the level of local, parish, poor rates frequent and not inconsiderable efforts were made in a number of boroughs to reduce the costs of policing and increase the value of successful surveillance. The Wiltshire borough of Marlborough provides the historian with particularly full records of this process, for the costliness of weights and measures regulation out of parish poor rate funds was regarded as a continuing problem by the Clerks of the Market both before and after 1797. In Marlborough it was the evolution of new forms of penalty for non-compliance with the standard weights established in 1792 that most immediately affected local market folk and most effectively charts the history of the costliness of regulation, for in general borough and parish inspectorates had little opportunity to make economies in their surveillance activities; theirs was a weekly round of inspections, carried on year after year, with little assistance or hope of catching all illegal trading. Before 1786, the Marlborough Clerk's court regularly imposed heavy fines and broke up captured weights [2]. In an attempt to increase the effectiveness of the policing of the markets - and no doubt to calm the

[1] Bucks. R.O., Q/WM/c/ 1-9; Wilts.R.O., QS/a/1/1-155, bundle 2.

[2] Minute books of the Clerk of the Marlborough Market, 1785-1851, Wilts. R.O. G 22/1/188/1 fo.5, entry for 16 August 1786.

apparently unhappy local traders - offenders were required by 1790 to submit their illegal weights to the Clerk for correction and subsequent return. They were not required to pay a fine and merely paid the cost of the physical alteration of weights [1]. After the imposition of the standard Winchester bushel by statute in 1792, however, this practice appears to have been less frequently used. With responsibility for ensuring the local observance of national weights standards now passing to all current inspectorates, the costliness of inspection increased. Weights had to be ordered from London with which to compare the weights used in the Marlborough market. Hence from the late 1790's, and within two months of the passing of the 1797 Act enabling the collection of substantial fines by local inspectors to be paid to the poor rate fund, confiscated weights were again being broken and heavy fines imposed for illegal use of false weights [2]. From 1801, the Clerk made further attempts to reduce the costs and increase the efficiency of regulation by again imposing harsh penalties and forcing guilty traders both to forfeit their weights and have their names published in local newspapers - a practice which slowly began to gain some following in number of boroughs [3]. What appears at first surprising from the record of the Marlborough court at least is that price changes do not appear to have been directly and singularly responsible for the changing administration of penalties; plainly clerks and other inspectors

[1] ibid. fo.20, entry for 20 September 1790 onwards.

[2] ibid. fo.49 ff., entry for 16 September 1797 onwards.

[3] ibid. fo. 70, entry for 25 April 1801. For examples of the use of publication as a deterrent elsewhere, see 50 Geo.III c.38 s.72 (1810) (Brighton Market Act); 56 Geo. III c.25 s.28 (1816) (Cowes market Act). The first recommendation for this form of punishment appeared in Times 26 April 1790.

worried far more about the cost of administering weights and measures regulations than in the effectiveness of the measures for securing lower prices and 'even trade'. In other provincial courts or at common councils of boroughs too there appears to have been a very similar pattern in the evolution of penalties. In Hertford, then a thriving market town, the resort to harsh penalties moved unevenly and almost counter-cyclically with price movements. The decline in the number of presentments in years of high grain prices (for example, in 1791, 1801 and 1815) was accompanied by a decline in the use of the penalty of breaking weights and throughout the early years of the nineteenth century fines alone were generally imposed and weights were not routinely broken [Table 5.1]. Only in the years in which a larger number of presentments were made were fines supplemented by alternative forms of penalty [1].

Table 5.1: Presentments to the Court of the Clerk of the Market, Hertford, 1776-1835 (August or September court).

1776 32	1791 4	1808 32	1826 31
1778 25	1793 31	1809 28	1829 28
1779 16	1800 13	1815 5	1830 14
1786 33	1801 6	1817 19	1831 27
1787 10	1804 23	1818 21	1832 11
1789 7	1805 10	1819 13	1834 15
1790 9	1806 8	1820 8	1835 8

Source: Hertford Borough MSS. volume 16 fos. 135-202, Herts. R.O.

Similarly, in the small east Berkshire market town of Maidenhead over a part of the same period the experience of penalty and policing followed the same pattern: fines alone were levied in years of little activity but were supplemented by similarly numerous additional forfeits for infractions of

[1] Clerk of the Market of Hertford papers, Herts. R.O. Hertford Borough MSS. vol. 16 fos. 135-202.

the statute law when presentments grew in number [1]. Again, price changes seem to have had little positive correlative effect upon the development of the system of enforcement adopted in Maidenhead. It is perhaps invidious to assert that these cases suggest positively that it was the cost of regulation and not the effectiveness of it that motivated organisational change within the provincial establishment in relation to weights and measures regulation. Nevertheless it can be argued from this slight evidence that local officers empowered to seize and break weights and measures were more concerned with the consequences for their poor rate than the consequences for the poor of unjust weights. Certainly the policing of communal standards did not automatically confer communal benefits anyway.

Where fines were imposed, following either divisional inspection and trial at the sessions court or at the parish or borough courts established to regulate trade, they tended to remain at the customary levels determined by the practice of those courts. While the 1795 Act had permitted penalties of any amount between 5 shillings and 20 shillings [2] few counties appear to have reached this upper limit of penalties (the Hertford market court retained fines at levels established in the 1760's until at least the 1830's). Yet the very fact that fines remained customary - usually representing the charges for the administration of the case and some 'fee' for the inspector - meant that the parish or county income from fines and even from the sale of the metal in false weights was small. In the Bury division of Suffolk quarter sessions fines usually totalled not more than

[1] Clerk of the Market of Maidenhead papers, Berks. R.O., M/JMs 1-3.

[2] 35 Geo. III c.102 s.2.

thirty pounds during the year and, in spite of the fact that they might have done so from 1797, the sessions of Suffolk only raised additional funds by selling false weights for melting down after 1830; this raised revenues to an average of over eighty pounds each year between 1830 and 1839 (Table 5.2).

Table 5.2 : Revenues of Suffolk Quarter sessions from fines and recovery of weights in the Bury divisional inspectorate 1811-1839.

	£	s.	d.
1811	4	18	1/2
1812			
1813	37	7	5
1814	33	18	0
1815	31	3	0
1816			
1817			
1818			
1819	12	3	2 1/2
1820	17	11	3
1821	73	0	5 1/2
1822	19	18	11 1/2
1823	58	15	2 1/2
1824	7	8	11 1/2
1825	3	19	6
1826	4	10	0
1827	9	17	6
1828			
1829			
1830	114	10	11
1831	82	18	10
1832	45	14	9
1833	39	14	1
1834	82	15	5
1835	52	4	8
1836	118	1	2
1837	118	9	7
1838	110	14	4
1839	137	15	2

Sources: Cash Book, Bury Division of Quarter Sessions, 1789-1827, Suffolk R.O. (Bury) Q /F1 ; Disbursement accounts, 1811-24, Suffolk R.O. (Bury) Q/F2 ; Quarter Sessions Treasurer's ledger, Bury division, 1830-1867, Suffolk R.O.(Bury) Q/F3.

So the additional levy from the breaking of weights significantly raised the revenues for the courts where it was adopted. Like the Bury Division of Suffolk, many divisional inspectorates and their county treasurers failed to immediately incorporate the allowance for breaking of weights, thereby raising revenues. The administration and economics of the regulation of market trade were plainly not easy to manage for many counties.

In fact at almost every turn in the development of the nineteenth century system of weights and measures validation there were complications in the simple machinery of local prosecutions and the specification of standards which bedeviled the avowed aim of the legislation to reduce the specification cost of the use of these simple contractual devices. Inspectors both before the nineteenth century reforms and after, complained that the validation of their own test weights had to be completed, at some considerable expense, in London [1]; that they desperately required some assistance to help with divisional inspections which were carried out over large areas of each shire, usually equivalent to a half or a third of the county [2]; and that the shortage of copies of weights increased their duties - on each inspection, official standard weights had to be collected from the shire hall and returned thereafter [3]. Far from alienating all of

[1] For example, J.B. Axford to John Swayne, County Treasurer, 14 November 1834, Wilts. R.O. QS /A1 /155; Anonymous report of a case concerning weights and measures, n.d. [dated 1825 from internal evidence], Beds. R.O. Q /AV /2 fo.2.; Letters concerning 'sending up' of weights and related sessions business, [?1825], East Sussex R.O. Winchelsea Corporation MSS., MS.364-67.

[2] William Le Hardy (ed) Hertfordshire County Records: Calendar to the Sessions Minute Books and other Sessions Records with Appendices, 1752-1799 volume 8 (Hertford, 1935), 468.

[3] e.g. Bucks. R.O. Q/WM/C/7.

the associated expenses in weights and measures regulation by transferring effective control over the part of the property rights in validation to inspectors, the treasurers of the counties and the owners of markets and their associated courts regularly paid for much of the rou tine cost of administration of the system; nevertheless it can be asserted that without the subcontracting of weights supervision the costs of market operation would have been much greater in reality. Constant efforts were made at national level to make the administration of the law economically viable for the counties and considerable attention appears to have been given to the problem of determining penal ties which would not leave counties and town councils out of pocket. In 1797 the entire bench was required to press warrants for the recovery of false weights from traders [1]; under the 1815 Act for the more effectual Prevention of the Use of false and deficient Measures' only one justice was now required to issue a warrant [2]. However little attempt appears to have been made to reduce the non-recurring costs of regulation: even in the consolidating legislation of 1824, the cost of obtaining copies of the official standards were exclusively assigned to the counties and no part of the real costs of obtaining weights was placed at the door of the central administration, apparently the specific intention of the drafter of the legislation [3].

[1] 37 Geo. III c.143 s.2 (1797).

[2] 55 Geo. III c.43 s. 2 (1815).

[3] 5 Geo.IV c.74 s.13 (1824). My conclusion that the 1823 Bill and later Act was intended to place the burden of the supply of weights upon the county sessions, borough courts and court leets comes from a reading of 'Remarks upon some of the practical Provisions contained in the Weights and Measures Bill..' [?1823], Goldsmiths Library, University of London, MS.459/1. Cf. Annual Review, (1823), 321 in which the parliamentary debate on the first reading of bill reports no animadversion on this point.

The considerable costs of weights and measures regulation brought about urgent and often exacting enquiries in the shires and the town councils into the real costs of administering the acts of Parliament ; several counties instigated formal inquiries as late as the 1830's and 1840's into the efficiency of the system adopted under the Georgian legislation.Apart from the continuing investigations by the Buckinghamshire sessions already mentioned, several counties included some consideration of weights and measures regulation in their general surveys of county expenditures during this period and a number of sessions launched specific investigations in this area.In Hertfordshire - for which the weights and measures issue seems to have been particularly important - the only item considered by an ad hoc committee of 1841 was the '...districts, emoluments and duties etc. of the Inspectors of Weights and Measures..' [1]. The problem appears to have been that several irregularities appeared in the accounts of fines furnished to the county clerk by the inspectors. The following year the sessions court adopted the recommendations of its committee that the accounts of the inspectors should not be forwarded to the finance committee of the sessions unless details of all levies and fines were sent in along with the precept of the justices permitting the inspection of weights and measures [2]. Expense was, however, always the most important issue for the sessions and, as a parliamentary inquiry revealed in 1833, the sums involved just for inspectors salaries and revenues from fines were often considerable (Table 5.3).

[1] G.H.Hotham to J.S.Storey, 12 November 1841, Herts.R.O. QS Misc.B96 /7.

[2] Le Hardy Hertfordshire County Records, 356.

Table 5.3 : Salaries and expences of the Inspectors of Weights Measures, 1821-32 for selected counties and divisions of counties, including London.

	Beds.	Midd.	Norfolk	Suffolk(a)	Suffolk(b)	London
1821			£115 9s 10d	£74 9s 6d	£119 19s 0d	£84 4s 4d
1822	£6 9s 6d		£142 12s 1d	£168 4s 8d	£102 19s 7d	£428 18s 10d
1823			£199 6s 7d	£52 10s 0d	£69 14s 9d	£392 13s 10d
1824				£42 10s 0d	£100 4s 6d	£421 15s 1d
1825					£ 94 7s 9d	£433 11s 3d
1826			5s 6d		£225 0s 1d	£430 19s 9d
1827		£292 4s 6d	£282 18s 3d		£101 19s 8d	
1828			£134 19s 8d		£103 16s 0d	
1829			£171 11s 5d		£70 1s 3d	
1830			£173 17s 3d	£79 8s 9d	£90 8s 3d	
1831			£180 6s 8d	£79 8s 9d	£91 1s 0d	
1832			£198 2s 1d	£81 14s 7d	£107 3s 3d	

Sources: 'Accounts from Treasurers of Sums Received, 1821-32...' BPP Sess. 1833, 32 (522) : 1-169 ; 'An Account of the Amount....of the Salary and Expences...' BPP Sess. 1826-7, 16 (434) : 565.

Note: Suffolk (a), Ipswich Division ; Suffolk (b), Woodbridge Division.

To appreciate the real cost of these supposedly inexpensive services when in quasi-public hands, it should be remembered that these fees and allowances for a few divisions and counties were part of a total expenditure of only £783,442 upon all of the services of the local government offices by all the English counties in 1832 [1]. The figures reported in 1833, whilst neither complete nor necessarily representative of the same kinds of expenditure, probably underestimate rather than overestimate the costs of regulating weights in provincial England. It certainly appears extraordinary that the cost of regulating weights in the

[1] J. Watson-Grice National and Local Finance : A Review of the Relations between the Central and Local Authorities in England, France, Belgium and Prussia during the Nineteenth Century (London, 1910), 18.

numerous large markets of the metropolis were, on average, only four times greater than those of the Woodbridge division of Suffolk which had only three market towns in need of inspection and whilst the fixed costs of weights and scales may account for some of this additional cost in the capital, the expenses of inspectors in both made up a smaller proportion of the total charge.

Before 1835, in fact, the supervision of weights and measures was both relatively easy and rewarding; after 1835 the dissatisfaction of the counties and the boroughs with the efficiency and with the cost of a 'privatised' inspectorate together with a series of court decisions admitting the possibility of selling by non-standard, customary, weights [1] effectively drove the government to accept the need for the establishing of a more professional corp of weights examiners. Finally in 1835 Parliament passed an act to finally transfer the administration of weights and measures to a locally established constabulary. Four years later, with the passing of the 1839 Rural Police Act the power to undertake inspections and seize false weights passed to the new police force which, although more Georgian than Victorian still, was at least salaried and not dependent upon the number of prosecutions for their reward. Gone were the quasi - private rights to market specification and some traders - possibly despairing of the apparent incorruptibility of a professional force of inspectors - wished the old inspection system were back again. In a final forlorn appeal to the local magistracy before the new police force took over the duties of the inspectors and sundry constables, the traders of the

[1] Joseph Chitty A Collection of Statutes of Practical Utility (London, 1837), 1106-1107 note (b).

Risbridge and Lackford hundreds in Suffolk complained

> That your petitioners feel confident that under the present system of Inspection in our District every important function is carried out impartially and judiciously, that nothing hitherto has been wanting to protect the public...[and that through the twice yearly surveys by quarter sessions appointees]...every facility is offered the honest trader to keep his Weights and Measures correct and just [1].

It should be noted that these complaints came from an area of Suffolk renowned for traditionally sending more offenders to a sessions trial than any other comparable district of the county from as early as 1804 [2]. Whether the disgruntled memorialists of the Suffolk hundreds were remembering kinder days in which bribery or corruption of the inspectorate was possible cannot be precisely ascertained but it seems likely that their fondness for the 'impartial and judicious' treatment of the older form of weights and measures surveillance owed not a little to its relative inefficiency as a means of detection and policing. What is significant is that by 1839 it was not the farmers of the area that complained of the assumption of the uniform service founded under the 1839 Act but the grocers, bakers, millers and other shopkeepers; the regulation of trade had moved away from being merely the regulation of production and wholesale merchandising to being the inspection of retail trade by a professional force of independent inspectors. In a community of retail traders, inspection costs were arguably smaller than in economies with an extended

[1] Petition to Suffolk Quarter Sessions, n.d., [?1839], Suffolk R.O. (Bury) Q/APw 1 (23). For a detailed account of the role of Suffolk constabulary in weights regulation before 1839, see the extracts in J.D.Wheeler 'The Borough of Bury St. Edmunds constabulary, 1836-57' Suffolk Review 2, (1963), 194-7. For more typical reactions to the 1839 Bill, in which Hertfordshire constables are indicted with inefficiency in their policing of weights and measures, see W. Branch Johnson 'The Parish Constable in 1830' Amateur Historian 4, (1960), 328.

[2] Iris; or Norwich and Norfolk Advertiser 14 July 1804.

hierarchical form of traders, middlemen and producers - each competing one with the other. Indeed it may be argued in Coasian terms that the specification costs of trade would necessarily be reduced through increased competition. Suffice it to say here that the story of the evolution of the mass market retail sector is not truly a part of the history of the rural south during the late eighteenth and early nineteenth centuries and that, in spite of the efforts of the councils, boroughs and sessions of the rural south to economise upon the specification costs of market trade to reduce the transaction costs of market trade during the period, underlying economic structural change during the latter half of the nineteenth and early part of the twentieth century probably performed that task more successfully and more efficiently.

This brief survey of the history of the regulation and inspection of Georgian and Regency market exchange has nevertheless pointed toward some important general conclusions which deserve amplification. In studying the practical face of legal supervision of market exchange two essential points emerge: first, that the very informality of the rural state belies the argued efficiency of sub-contracted supervision and, secondly, that practise departed from the aim of legal reform in 1792, 1825 and 1835 to reduce the costs of market regulation and thus local expenditures. Both informers and weights inspectors seized the opportunity offered by the faliure to internalise regulatory control within the market system and turned it to their own advantage. The rise of the 'informing gang' - largely a late eighteenth and early nineteenth century phenomenon - and the continuation of the independent inspectorate until 1839 suggests that

opportunist behaviour within the market institutions of the provincial south was considerable and that alternative regulated institutional structures failed to evolve principally because of anticipated costliness rather than because of any suspicion that supervision was of necessity an unwelcome intrusion. In an age in which popular suspicion of the market dealer ran higher than hitherto, it is perhaps surprising that largely voluntaristic forms of economic organisation remained in place as a means of preventing exploitation and rank illegality. In terms of the PRTC model developed here, however, it is perfectly explicable. The creation of private rights in the offices of market supervision might have reduced transaction costs for the owners of the market and for the market user. What appears at first sight confusing to the observer is the longevity and survival of elements of private opportunist action in these nominally community based institutions. This need not cause any surprise however: the voluntarism of the informer and the weight fines 'farmers' was probably the easiest solution that the ill-coordinated, decentralised, market could find in the circumstances. Again, inference from evidence of organisational behaviour has led us to the conclusion that the changing nature of regulatory organisation - and the entailed privatisation of policing rights in market trade - had consequences for an immeasureable and chimerical transaction sector. We have not proved that the organisational changes we have shown led to altered levels of transaction cost; in common with other parts of this essay the effort has been to demonstrate that by focusing attention upon an hypothesised transaction sector at all we have been enabled better to understand often subtle, often complex, institutional transformations.

CHAPTER TEN: PROPERTY RIGHTS, TRANSACTION COSTS AND THE ECONOMIC HISTORY OF MODERN BRITAIN.

> '...economical questions, or such as relate to wealth or property, demand the careful attention of the historian, inasmuch as they influence most powerfully a nation's moral and political condition, that is, in the highest sense of the terms, its welfare or misery'[Thomas Arnold 1842]

One of the principal themes of this essay has been economic and not historical: it has partly been the purpose of much of the above to justify the verdict of many economic theorists that the economic analysis of property rights is fraught with peculiar difficulties of method and, necessarily, of empirical implementation. However, the main product of the essay has been to demonstrate the value of a PRTC approach to the development of the modern economy and while the historical theme of institutional development through property rights redistribution in accord with PRTC theory has no doubt appeared at times somewhat laboured, it may be nevertheless maintained that the study of the institutions of property and associated transaction costs brings us nearer to an understanding of the origins of modern economic structure and, thereby, performance. At a time when not only economic historians are concerned with the competitive environment and the adaptability of institutions, this form of historical economics provides the most successful challenge to those who regard all institutional adaptation as a function of macroeconomic performance. Yet ours is by no means the only institutional analysis of British economic performance since the eighteenth century; it is however the most satisfying for the student of the late eighteenth and early nineteenth centuries. It

has also been able to deal with an important difficulty in the way of advancing our knowledge of the history of the structure of the economy, for it has provided a perspective upon what might be called the 'business history of the market'. A history of structural change in the economic hierarchy of production without an understanding of the long term evolution of the market is somewhat analagous to a 'Hamlet without the Prince', for if the decline of the market resulted from the development of internalising hierarchies and alternative governance structures it is for the historian to account for that decline as much as for the institutional innovation of developed capitalism. In general all alternative formulations of long-term business history tacitly assume that firms superseded markets because the latter were no longer efficient allocative devices; however, no organisational evidence has been adduced to support this view. In order to place the current work in the grander perspective of that current business and economic history literature which explicitly deals with the history of structure, it is necessary to examine the foundations of structural economic history; it will then be possible to place our knowledge of the behaviour and structure of the Georgian market economy of the rural south in the context of alternative theory and of wider historical change.

Some economic historians who make use of the institutional approach in economic history argue that institutional rigidity and inflexibility has been the dominant characteristic of the recent British economic past and that subsequent decline in the twentieth century has been due to the obstruction of '...individualistic as well as collective efforts at

economic innovation'[1]. They argue that only supply-side, market, rigidities affect organisations and effect institutional change and that, consequently, property rights are largely unaffected by changing conditions associated with rising or falling aggregate levels of transaction cost. Indeed, new British institutionalist writing - inasmuch as it exists as a separate and distinguishable genre of economic history [2] - largely ignores the development of the transactions sector and instead focuses upon the comparative advantage of other non-atomistic market cultures. It is, in fact, a defence of a very old fashioned variety of technocratic corporatism - quite alien to modern European industry - by which collective decisions were hierarchically arranged by an ineluctable economic logic comparable with Coase's inescapable mechanism of the invisible hand. Allied with Wiener's searching critique of the cultural foundations of structural retardation [3], the new historical institutionalism brings together these themes of the structural obstinacy, ambivalence to growth and politico-

[1] Bernard Elbaum and William Lazonick 'An Institutional Perspective on British Decline' in Bernard Elbaum and William Lazonick (eds.) The Decline of the British Economy (Oxford, 1986), 2.

[2] The neoinstitutionalism I am refering to is comprehensively surveyed in Elbaum and Lazonick Decline, 1-17, 39-45 and the works cited therein. The use of the term 'British' institutionalism is strictly inaccurate. Most of the contributors to this developing research area are in fact North American. British historical economic institutionalism as a critique of the neoclassical theory of institutions is chiefly represented still by W. Arthur Lewis The Theory of Economic Growth (London, 1955), Chp.3, esp. 142-162, although an older native institut-ionalism, led by C.R.Fay, deserves some attention. Since British business historians turned their attention to the economic theory of corporate economy after the work of Ronald Coase had achieved a certain notoriety among industrial economists, the historical economic study of organisation has been heavily influenced by neoclassical theory and Coasian extensions thereof (notably Leslie Hannah The Rise of the Corporate Economy [second edition] (London,1983), Chp. 1).

[3] Martin Wiener English Culture and the Decline of the Industrial Spirit, 1850-1980 (Cambridge,1981).

economic corporatism that are said to characterise British economic history since the end of the last century.

This 'new British institutionalism' departs significantly from our own approach in two important ways. First it embraces the neoclassical economists' account of the nineteenth century firm as the physical manifestation of that perfectly competitive organism of commerce whose development was engineered by nineteenth century growth and whose characteristics were to remain largely unchanged until the early twentieth century. Integration and corporate growth through acquisition it is argued were the consequence of the need to protect markets, but further adaptation was apparently thwarted by an innate industrial conservatism. Secondly the British new institutionalist historiography regards the passing of the 'market culture' necessary to encourage institutional adaptability as an essential feature of modern industrial decline. From a late eighteenth century perspective, neither supposition appears convincing.

An alternative to this 'new British institutionalism' which also claims to account for the performance of the macroeconomy from evidence of structural change is the more conventional Chandlerian analysis most recently applied to the study of the history of the multinational corporation and the

multiproduct, multidivisional firm [1]. In Britain historians have in general failed to recognize in Chandler's work any sign of what he himself regards as a new 'institutional, comparative' economic history [2]; rather, British business history has been dominated by a more eclectic approach to the study of the structure and organisation of the economy in which econometric, case study and theoretical elements are drawn together [3]. Since the 1960s, indeed, British economic and business historians have been somewhat reluctant to choose between various proffered methods of business history and have sought truth in diversity. Yet the Chandlerian approach has had some notable followers, either in the form of a close alignment

[1] Reviewed in Stephen Nicholas 'The hierarchical division of labour and the growth of British manufacturing multinationals: 1870-1939' in Alice Teichova, Maurice Levy Leboyer and Helga Nussbaum (eds.) Multinational Enterprise in Historical Perspective (Cambridge,1986), 241-256; Diane Hutchinson and Stephen Nicholas 'Modelling the Growth Stages of British Firms' Business History 29, 1987, 46-64; T.R.Gourvish 'British Business History and the Transition to a Corporate Economy: Entrepreneurship and Management Structures' Business History 29, 1987, 18-45; H.J.Archer 'An eclectic approach to the historical study of U.K. multinational enterprises' unpublished PhD dissertation, University of Reading, 1986, Chp. 1.

[2] Alfred D.Chandler 'Comparative Business History' in D.C.Coleman and Peter Mathias (eds.) Enterprise and History : Essays in Honour of Charles Wilson (Cambridge, 1984) pp. 3, 9-10. It should be noted that Chandler's 'comparative method' is intended to be a pragmatic but objective historical tool and not, as in the case of the so-called 'comparative institutions approach' developed by Coase and Demsetz, a largely subjective form of transaction cost analysis. Barry P.Brownstein 'Pareto optimality, external benefits and public goods: a subjectivist approach' Journal of Libertarian Studies 4, 1980, 98-100 is instructive in relation to the differences between the methodology of Demsetz/Coase and, by implication and through an analysis of the objections of neo-Austrian economists (notably Israel Kirzner), Chandler's own brand of institutional comparativism.

[3] Notably in Hannah Rise of the Corporate Economy, passim.

with the comparative method itself [1] or more obliquely through adherence to the application of Chandler's peculiar version of transaction cost method [2]. In Britain, in fact, the generic Chandlerian paradigm has never entirely held sway, so that while one historian can regard the proper subject of the study of the business history of the nineteenth century firm to be the decision-making of economic agents [3], another regards the function of the business historian to be the selective elucidation of those factors which 'favoured or retarded' the achievement of the corporate business structure of the twentieth century [4]. One reason for this apparent diversity is purely chronological. For Chandler, the history of the modern business enterprise is overwhelming the story of the decline of a merchanting economy and its replacement by a settler economy in the course of the nineteenth century; Chandler, in short, seeks to chart the

[1] B.W.E. Alford 'Entrepreneurship, business performance and industrial development' Business History, 19 (1977), 116-138; Francis E. Hyde 'Economic Theory and Business History. A Comment on the theory of profit maximisation' Business History 5, (1962-4), 1-10; Peter L. Payne 'The uses of Business History: A Contribution to the Discussion' Business History 5, (1962-4), 11-21. (It should be noted that British business historians have never in general advocated or articulated support for a comparative institutionalist analysis of the type favoured by Schweitzer - born in part of that central European institutionalism carried over from the nineteenth century and revived by socialist theorists like Halm in Germany in the 1920's and , subsequently, in America - a version of institutionalism which still commands some following in the United States (Arthur Schweitzer 'Comparative Enterprise and Economic Systems' Explorations in Economic History 7, (1969-70), 413-432)).

[2] Hannah Rise, Chp.1; Leslie Hannah (ed.) Management Strategy and Business Development: An Historical and Comparative Study (London,1976); Barry Supple 'Introduction' in B.E.Supple (ed) Essays in British Business History (Oxford,1977); Peter L. Payne 'Industrial Entrepreneurship and Management in Great Britain' in M.M. Postan and Peter Mathias (eds) The Cambridge Economic History of Europe, VII, part 1 (Cambridge, 1978), 180 -230 for discussion of this work.

[3] Alford, 'Entrepreneurship, business performance', 123-4.

[4] Hannah Rise of the Corporate Economy, 6.

decline of mercantile forms of allocation rather than pure market ones [1]. In this at least he keeps good company with some Marxist historians who have all but rejected the idea that 'merchant capitalism' was ever likely to have been anything other than a transitional form of economic organisation [2], and argues that American economic development was in this sense not at all atypical.

In Britain - an imperial economy with well established internal trade - the early nineteenth century witnessed if anything a growing strength of the foreign trade and mercantile sectors of the economy. Consequently a number of factors associated with the expansion of American trade (sharply rising consumer demand, the growth of new transportation networks, the political security of the new republic and the westward movement of the economy as a whole) had little or no effect upon the mercantile sector and caused little of that transference of wealth from merchanting to production which characterised the development of the modern American firm. In Britain, indeed, the internalisation of production by mercantile agents would have proved unthinkable in a business empire dependent upon the iron Ricardian law of comparative advantage and free trade, and it is difficult to think of any other European economies for which the American experience

[1] Alfred D. Chandler The Visible Hand: The Managerial Revolution in American Business (Cambridge, Mass., 1977), Chp. 1. Recently, Chandler has tacitly recognised that the experience of Britain may have been somewhat different from that of the United States - see Alfred D. Chandler 'Comment' in Keiichiro Nakagawa (ed) Strategy and Structure in Big Business: Proceedings of the First Fuji Conference (Tokyo, n.d.), 40.

[2] e.g. Elizabeth Fox-Genovese and Eugene D. Genovese Fruits of Merchant Capital: Slavery and Bourgeois Property in the Rise and Expansion of Capitalism (New York and Oxford, 1983), 4-8; Michel Beaud A History of Capitalism 1500-1980 (London, 1984), Chp. 1.

would seem to have been at all applicable. This very real difference between the experience of the United States and that of Britain has resulted in the frequent appeal of British economic historians to growth itself as the engine of business development in the course of the nineteenth century, contradicting the basic hypothesis of Chandlerian institutional economic history that structural change is primarily endogenous.

In this essay, we have offered an alternative approach to economic institutional development which, while broadly sympathetic to the Chandlerian aim of developing an account of economic development featuring the endogeneity of organisational change, is nevertheless sufficiently in keeping with the heterodox post-Commons tradition of 'institutionalism' to recognise that the study of the evolution of market and hybrid forms of governance structure requires that human agency be replaced by institutional function in any account of the evolution of organisational form. Here we have focused upon the often forgotten history of the market as the precursor of the nineteenth century firm and the later twentieth century corporation. The intention has been to illustrate how far a broadly 'institutionalist' account of the history of the institution of the provincial market fits the facts, and to illuminate some portion of the subsequent history of other allocative devices; it may in fact be worth making the consequences of acceptance of the current work plain.

Inasmuch as the nineteenth century, non-integrated, firm was the product of contemporary competitive conditions and the need to economise upon

intra-agent and market transactions, the hierarchical arrangements it developed were neither new nor entirely suited to atomistic capitalism. We have suggested, in a somewhat indirect and veiled way, how the internal structure of the firm may have copied not the governance structures of a 'pure market', in which ownership and control were not divorced, but may rather have adapted the transaction technologies of eighteenth century market society by further internalising private rights to specification, measurement, policing of contracts and so forth. We have also argued that the specification of those private rights had proceeded a fair way without the need for some organising structure like the modern firm. Alternative hierarchical arrangements dependent upon the externalisation of incentive costs in the absence of formalised hierarchies - like the policing of the market by informers and inspectors paid 'by results'; like the development of free contracting, the low cost fully specified lease and the creation of new institutions for the supervision of elementary contracts; and like the transfer of rights in markets to collective bodies of private rights holders - preceeded and no doubt moulded firm-type institutions, which in contrast internalised monitoring functions to reduce shirking and other varieties of opportunism. This process of discovering external solutions to problem of transaction costs in the market economy appears to have been the key feature of this period in the evolution of economic organisation. Equally it would appear that only in a world of relatively high transaction costs and in the absence of internalised hierarchical structures would such sub-contracting forms of organisation for the monitoring, enforcement and policing of exchange have been possible. It would be worth further investigation to discover how far the nineteenth century firm actually

depended upon these predecessor organisations for their structure and operation. With these eighteenth and early nineteenth century observations in mind it is also worth investigating whether the development of hierarchical arrangements within firms was determined in the course of the nineteenth century by experience of market needs or by the adaptation of these intermediate firm-type hierarchies of the provincial market.

In brief, and in contrast to the Chandlerian position, this essay has suggested that the reduction of transaction costs associated with the rise of firm-type hierarchies properly began in the market institutions of the eighteenth and early nineteenth century. Through the creation of separate property rights in monitoring, control and specification in contract, Georgian Britons sought the externalisation of transaction costs in the absence of existing non-market hierarchies. The divisionalisation of control and allocation associated with the internal organisation of firms and firm-type hierarchies may have failed to materialise in the rural south principally because of the longevity of older forms of the community control and policing of market society. Whether or not this was the case markets did not, so to speak, 'become' firms, nor did firms emerge after the decline and disappearance of markets. Rather the two continued side by side well into the nineteenth century, sharing often common features of form and internal structure.

There is naturally a danger in seeing in all of this some grander scheme of economic development in which the articulation of allocative efficiency through institutional change - driven by the level of transaction costs -

determined not only the development of the natural forms of capitalist enterprise but also the development of capitalism itself as an accumulative form of economy. Yet it must be remembered that it is only the incremental institutional change of governance structures and not the absolute change from one form of economy to another that is the concern of PRTC methodology. As Braudel has gently reminded us 'Capitalism does not invent hiererachies, any more than it invented the market, or production, or consumption; it merely uses them. In the long procession of history, capitalism is the latecomer. It arrives when everything is ready...In other words, the specific problem of the hiererachy goes beyond capitalism, transcends it, controls it a priori' [1]. Consequently no single form of analysis is likely to be able to account for the tendency toward internal organisational form that is the basic theme of PRTC accounts in economic history. Equally we have not needed to claim, as Douglass North has of late, that such a general theme does exist in the history of economic institutional development and is the emergence of democratic freedoms [2]. This so-called 'political economic history' is in reality an extension of libertarian thought to the domain of the economic past and relies upon agreement to the premiss that all forms of organisation create malleable and non-opportunistic 'ideologies'. In such an account of the decline of the

[1] Fernand Braudel Afterthoughts on Material Civilization and Capitalism translated by Patricia Ranum (Baltimore and London, 1977), 75.

[2] Since Structure and Change in Economic History (New York, 1981) and Margaret Levi and Douglass C.North 'Toward a Property-Rights Theory of Exploitation' Politics & Society 11, 1982, 315-320, North's version of PRTC method has been becoming more overtly libertarian (in the Austrian sense) and more political. His most expansive treatment is 'Institutions, Economic Growth and Freedom: An Historical Introduction' Department of Economics, Chicago University, Workshop in Economic History, seminar paper 8687-04 (1986).

market and the rise of the firm, the transaction sector includes substantial elements representing 'ideology' (by which North has indicated he means more than just bounded rationality) which are the focus of economising activity by existing governance structures like markets. Firms emerge, according to this grand theory of evolutionary political economy, because the costs of sustaining the invalid ideology of market individualism became greater than the benefits from the continuance of market allocation. Here we have need to take little account of 'ideological' considerations in extending the PRTC method to the study of institutional change in the late eighteenth and early nineteenth century.

Yet if the use of PRTC methodology has a more humble role in the study of this 'business history of the market', the case it offers is no less open to challenge for that. In general there have been two great traditions of thought which have sought to account for the decline of markets and their replacement with alternative forms of hiererachy, both of which depart significantly from the PRTC approach. Albert O.Hirschman has conveniently described these as the 'feudal shackles' thesis and the opposing 'self-destruction' thesis [1], the latter a largely late nineteenth century, Hegelian, argument while the former is intimately associated with early enlightenment thought. The second argues that the conflict between public morality and the commercial ethics of competitive behaviour are destined to destroy the market and replace it with some higher form of collective allocation. In an extension of the classical economists' model of growth,

[1] Albert O.Hirschman 'Rival Interpretations of Market Society: Civilizing, Destructive or Feeble ?' Journal of Economic Literature 20, 1982, 1463-1484. I have extended Hirschman's argument somewhat here but the essential character of that argument remains unaffected.

for instance, Marx famously argued that the accumulation of unproductive capital would create the circumstances in which the market economy and society of the nineteenth century would be replaced by a more efficient allocative device in which capital replaced labour and competed away profits. The first approach is, however, less obviously grounded in theory and carries something of the air of Cassandra-like 'futurism'. Smith, the most well known champion of the market, argued that feudal institutions and motivations would destroy the market economy unless individual self-interest (or 'self-love') was given full reign in the market [1]. Only the powerful self-love of the monopolist and merchant could escape the effect of these restrictive codes of feudal governance and, unless a moral revolution were effected in favour of self-love in economic life market institutions would be replaced by centralising hiererachies.

Certain Marxist economic historians have made much of both in explaining the relatively short life of pure market capitalism, but in general economists and historians only occasionally allude to the full form of these opposing explanations. The 'feudal shackles' thesis has recently been popularised by a resurgent right in the Anglo-American world along with use of much of the public choice theory of the Chivirla economists and the 'self-destruction' argument regularly reappears as part of a critique of capitalism by neo-Ricardians and Marxists alike. Both approaches depend upon agreement to the simple proposition that changes in economic motivation affect institutional structure and cause organisational change

[1] See J.Ralph Lindgren The Social Philosophy of Adam Smith (The Hague, 1973), 107 citing Smith in the Theory of Moral Sentiments. Generally, see Donald Winch Adam Smith's politics: an essay in historiographical revision (Cambridge, 1979), Chp. 4.

and portions of both live on in alternatives to PRTC explanations of the business history of market economy. In this essay we have set great store by the fact that we have had to make no assumptions about human motivation - and have certainly not had to assume that market behaviour is always and everywhere affected to the same degree by the desire for profit or utility maximisation. Instead, the PRTC approach developed here regards institutional change as the consequence of transaction cost reduction alone and pays no attention to the state of public mores or the degree of market individualism itself. In this sense the PRTC approach developed in this essay - which focuses upon institutions and not upon competitive outcomes - is superior to alternative formulations of the history of market institutions. However, it must be remembered that this study has concentrated only upon the development of late eighteenth century rural English experience and the pattern of institutional evolution elsewhere may not match that of the provincial south.

These alternatives to the PRTC approach taken in the essay are in a very real sense rivals in the contest for a satisfactory account of the evolution of strategy and structure in past time, but none appear to have adequately replaced the fundamental characteristics of the historical economic method utilised in this study. This essay has been in part an attempt to develop a contemporary method of historical economics but it has also been able to suggest how organisational change has occurred over time in the rural institutions of the south of England. In the final part of this chapter and essay, I want to consider the possible applications of such a method to the wider theme of the development of economic

organisation in capitalist society by exploring briefly - and in a less detailed fashion - some subsequent developments in the history of property rights in Britain.

II

In common with much work within the PRTC paradigm, we have asserted that the logic of organisational change is to be found in the economising function of hierarchy, and have maintained that in the absence of alternatives to non-market hierarchy, markets are forced to externalise elements of aggregate transaction cost by the creation of separate property rights in policing, enforcement and search. The reader will have asked already why it was that in the course of the nineteenth century the internal hierarchical arrangement of the firm superseded that of the market - that is, why the transition to firm-based hierarchy occurred when it did. One possible answer to this lies in the fact that throughout the later nineteenth century private and communal rights became increasingly difficult to distinguish one from the other. The growth of 'state communalism' was a theme for Dicey and T.H.Green, for Marshall and Schmoller, precisely because it constituted the single most important aspect of nineteenth century development. For them, as for some later historians middle and late-Victorian local corporatism distinguished the Victorian from the Georgian age, and there is some truth in the assertion that later nineteenth century towns and cities deliberately divorced ownership from control in order to gain from further reductions in market failure. The Factory Acts, the Passenger Acts, the social legislation of Disraeli's

first ministry and even the Edwardian reform of the Poor law in the form of the Workman's Compensation Act can be - and to some extent already have been - interpreted in this way. One can regard the effort to minimise transaction costs and eradicate market failure as the prime reason for the creation of municipal socialism in the larger cities of the industrial regions of England and Scotland, for the increasing resort to statute in preference to judge-made law in the regulatory sphere and for the abandonment of classical laissez-faire in relation to the regulation of work discipline.

One consequence of this movement toward the internalisation of potential transaction costs which has been characteristic of the last two centuries has been the growth of voluntaristic associations and the transformation of political society to a participatory, pluralistic, democratic form. Through the agency of representative groups, trades unions, political lobbies and parties and other forms, organisations have sought to integrate political and economic decision-making more completely than localised municipalisation allowed. Yet here too the absence of formalised hierarchical arrangements have required some alternative strategic solutions to be preferred. Mancur Olson's celebrated 'theory of groups' on the right and the rediscovery of the principles of Marx's theory of alienation on the left since the 1970's both attest to the need for a full explanation of the fact that such groups have great difficulty in attracting extensive support and reducing transaction costs through the absolute internalisation of sources of market failure. In fact, in their role as monopolistic institutions, they actually create the conditions for

market failure.

Firms and firm-type hierarchies, however, are quite properly the focus of most attention and, since Gardner and Means wrote, both economists and economic historians have been well aware of the consequences for economic performance of changes in industrial structure. The rise of corporatism, technocracy, Fordism, scientific management and the discipline of management merely attest to the wider significance of the creation of giant corporations in the course of the last three quarters of the twentieth century. Corporate growth may in fact be regarded as the final stage in the evolution of internalising strategies for transaction cost reduction, but it should be remembered that corporations achieve this end by creating 'internal markets' for components and skills similar to those which are characteristic of some forms of state socialism. Market failure is arrested by the corporation through mimicry of the functions of market organisation.

In fact elements of market form and function remain embedded in the structural foundations of contemporary economic organisation precisely because the effort to internalise complex external effects and enhance welfare has become too difficult and costly and the option of partial externalisation through sub-contracting arrangements, joint ventures, information agreements and product licensing has emerged as a strategic solution to the problem - and in a form not entirely unrelated to the experience of the rural world of the eighteenth century. In the modern economy, contractual relations serve the purpose of internal allocative devices - such as markets - and liability rules in bilateral contracts are

increasingly replacing the coordinated monitoring and policing of partners. This movement toward liability-based contracting is partly a result of the legal revolution in elementary contract of the nineteenth century (Chapter 6 above); partly the outcome of greater contractual and technological specialisation in production; and partly the result of the changing industrial structure of modern capitalism. Contracting, in short, reflects the effort to minimise allocative costs through the full assignment of property rights and the establishing of an efficient system of forfeit and liability for market failure.This movement toward the unpoliced, decentralised, contractual arrangements of the modern economy is perhaps the most important feature of later twentieth century capitalist enterprise. Equally, of course, firms have engaged in the process of rationalisation through acquisition, merger, patenting monopoly and other forms of reducing potential threats from competitors since the nineteenth century. Whether explained in conventional terms as the outcome of strategic conduct in defence of existing monopoly, as (in neo-behaviourist terms) the result of perceived synergistic gains from vertically integrated management control and research and development activity, or (in evolutionary terms) as the outcome of a process of industrial 'natural selection', we can regard the process of market concentration as the result of transaction cost forces.

If modern capitalism represents a different form of organisation with respect to transactions than that of the classical nineteenth century firm, the latter stands in the same relation to the provincial market. In this essay we have argued throughout that transaction costs considerations have

shaped the evolution of the structure of the economy, not as the result of rational calculation or through constraints upon individual utility functions, but through institutions themselves. The rise of the modern economy can be written largely in these terms; as the development of a complex network of 'transaction cost economising' elements, comprising both firms, governments and other forms of association intended to reduce the costs first of exchange and latterly of transaction through contractual arrangements. The leitmotiv of this essay has been the failure of the eighteenth century and early nineteenth century rural English market to transform itself sufficiently to achieve this end; the remarkable feature of its evolution however is that it went some way toward it by the awkward route of creating private rights in transaction technology and decentralising - even privatising - rights in control and policing. The true marks of modernism in economic terms may indeed be that organisations do not need to create such separable rights and externalise control in order to reduce transaction costs. The creation of alternative forms of internal hierarchy which achieve the same end - or even perform more adequately in the task - is in fact the principal theme of modern economic history and is consequently of prime interest to the historical economist.

APPENDIX 1

'The comparative statics of transaction costs'

The analysis of transaction costs above (Chapter 2) deals principally with the incidence and definition of transaction costs in partial equilibrium. This appendix provides an alternative comparative static optimisation approach to transaction costs in partial equilibrium developed separately from, but bearing some resemblance to, the recent diagrammatic presentation of Hill and Kim [a]. Where necessary, I have incorporated their analysis of 'internalisation costs' and have adopted their distinction between ex ante and ex post transaction costs for convenience.

Two varieties of transaction costs can be defined - those incurred 'ex ante' (including the costs of contract-making, arranging exchange and so forth) and those incurred 'ex post' (including the costs of bearing opportunistic behaviour and the costs of policing contract implementation). Total transaction costs (T) are the product of both categories of transaction cost, viz.

$$T = t_a + t_p \qquad \text{[Eq.1]}$$

Whilst 't_a' costs are fixed, 't_p' costs vary according to the probability 'p^*' of opportunistic deviation or 'cheating'(C). Thus, Kim and Hill write,

[a] Charles W.L. Hill and W. Chan Kim 'Searching for a dynamic theory of the multinational enterprise: a transaction cost perspective' Strategic Management Review, 9, (1988), 93-104.

$$t_p = p^*(C) \qquad \text{[Eq.2]}$$

The equilibrium, 'x', of 't_a' and 't_p' is determined by the simultaneity of:

$$p^* = x.(1/C)$$
$$p^* = 1/(x.R^{-1})$$

so that:

$$T = 1/(x.R^{-1}) + x.(1/C) \qquad \text{[Eq.3]}$$

Before solving for 'x', we need the marginal condition in 'δx', so

$$\delta T/\delta x = -1/(x^2.R^{-1}) + 1/C \qquad \text{[Eq.4]}$$

Rearrangement and solving for 'x^*' (equilibrium),

$$x^* = \sqrt{C/R^{-1}} \qquad \text{[Eq.5]}$$

At this point, 'T' is minimised.

BIBLIOGRAPHY

BIBLIOGRAPHY

This bibliography is arranged in sections corresponding to the major classes of material used. It records only those items referenced in notes to the text. In the course of research many thousands of manuscripts, contemporary books and pamphlets were consulted far exceeding the numbers given here. The sources used can be divided into the following groups:

1.PRIMARY SOURCES: MANUSCRIPT MATERIAL.

1.1 Public Record Office and Scottish Record Office.

1.2 National and local library collections.

1.3 County Record Office collections.

2.PRIMARY SOURCES: CONTEMPORARY PERIODICALS (excluding newspapers).

3.PRIMARY SOURCES: CONTEMPORARY NEWSPAPERS AND EPHEMERAL PRINTS.

4.PRIMARY SOURCES: CONTEMPORARY MAPS, ATLASES ETC.

5.PRIMARY SOURCES: BOOKS, PAMPHLETS ETC.

6.SECONDARY PUBLICATIONS.

6.1 Books and articles.

6.2 Theses and dissertations.

6.3 Unpublished papers.

1.MANUSCRIPT MATERIAL

Abbreviations correspond to those used throughout the essay and given above.

1.1 PUBLIC RECORD OFFICE AND SCOTTISH RECORD OFFICE

1.1.1 PRO (CL) and (Kew)

Board of Trade Papers

B.T. 6/130-39 (Papers relating to corn,1789-1800).

B.T. 6/228-9 (Papers on finance, 1783-4).

Chancery Petty Bag C.202/161/24 - C.202/230/29.

Writs for market administration, building or changing of market days, various dates.

Chancery Masters Exhibits C.103/44 Parts I-III.

Miscellaneous manuscript collections of notices, ledgers, accounts etc., various dates.

Duchy of Lancaster estreats, grants and assignments D.L. 30-41, D.L.50.

Grants of markets, precedents of action and estreats of land and title.

Home Office Papers

Collections of correspondence, 1781-1819 H.O.42/1-203.

Collections of correspondence, 1820-1835 H.O.44/1-28.

Privy Council (unbound) Papers

Consumption reduction returns, 1796, P.C. 1/33/A87,88.

Letter books and correspondence to the Privy Council,1780-1799, P.C. 1/12-164.

Ministry of Agriculture Papers

M.A.F. 7/3/3-8 Miscellaneous statistical summaries of livestock importation and consumption, 1849-52.

State Papers Domestic Letters and papers 1780-82, S.P. 37/14-15.

War Office Papers Letters and Papers, 1785- , W.O. 55/1548-2250.

Miscellaneous Isle of Wight County Court minute book, 1806-10,AK 17/1.

1.1.2. Scottish Record Office, Princes Street, Edinburgh

Melville MSS Correspondence and papers concerning invasion, 1798, GD 51/2/1057.

1.2 NATIONAL AND LOCAL LIBRARY COLLECTIONS (excl. newspaper collections)

1.2.1 Bath Public Library, Queens Square, Bath

'Travel diary of three weeks tour in S.E.England,1785 [by] Elizabeth Collett' (typescript, 1947) [no accession number].

1.2.2 Bodleian Library, Oxford

Accounts and bills for the rebuilding of Oxford market, 1797-1855, MS. DD Parsons d.4-7.

1.2.3 British Library, Russell Square, London

Melville MSS., Correspondence, 1793-1817 , Add. MSS. 43770.

Franklin MSS. Journals of Tours of Towns of England and Wales, 1789-1810, 1825 (4 volumes) Add. MSS. 47771.

Add. MSS.

'Abstracts of Letters and Papers relative to the Treasury, Revenue...' [1796] Add. MSS. 24134.

Ely Militia MSS., Correspondence 1799-1806, Add. MSS. 35672-35675.

Windham MSS., Correspondence and papers, 1794-1803, Add. MSS. 37874-37890.

Stowe MSS. 'A Register of the Names and Occupations of all persons residing within the County of Berkshire...'[1798] 2 volumes, Stowe MSS. 805-806.

1.2.3 Cambridge University Library, Cambridge

Plumtre MSS.

'Tour of the Midlands, East Anglia etc....' [1790] Add. MSS. 5794,

'Tour into Derbyshire' [1793] Add. MSS. 5804.

'Journal of a Tour...made in July 1800...' Add. MSS. 5819.

University Archive MSS.

'Abstract of finance...'[1787] U.A. MSS. 5222 (BB).

Papers concerning the bread assize in Cambridge,1835,U.A.MSS.T.VIII.6.

1.2.4 North Devon Atheneum Library, Barnstaple

Resolution concerning the opening of Ilfracombe market, 1802, Acc.1767.

Invasion returns for various parishes, 1803, Acc.842,843,847 and 848.

1.2.5 Royal Institution of Cornwall Library, Truro

Invasion returns for various parishes, 1803, NL 82-86.

1.2.6 Swindon Local Studies Library, Swindon

'Diary of Thomas Goddard, 1810', Goddard MSS. 1397.

MS. notebook of a farmer, c.1789-1810, Ref. L/914/8/Bew./45486.

1.3 COUNTY RECORD OFFICE COLLECTIONS

1.3.1 Bedfordshire Record Office, Bedford

Papers in a case concerning weights and measures [nd,?1800], Q/AV/2.

Accounts of the rebuilding of Dunstable market,1803-04, R5/955.

'Treasurers General Account of the Application of the County Rate...', 1794-1824, C.T. Q. 7.

County Treasurers Accounts, 1834-63, C.T.A.A. /1.

Treasurers Accounts, 1824-58, C.T.A.M.

Invasion returns under the Defence of the Realm Act, 1803, HA15/1; AD 1975.

Dunstable Corporation tolls, 1743-1855 and notices concerning toll, 1743 and 1814, AD 3236.

Leighton Buzzard toll leases, KK.320-3 (1 bundle, no piece numbers).

Letters and plans relating to Polton market, various dates, HA 326-332.

1.3.2 Berkshire Record Office, Reading

Leases of Wallingford Market, 1634-1829, W/TM , W/TLt 1-11.

Lease of market tolls, Wallingford, 1700-1878, W/RTc 1-3.

Records of the Court of the Clerk of the Market of Maidenhead,1760-1834, M/JMs 1-3.

Diary of the Constable of Cookham Dean, 1800-39, D/P 43/10/1,2.

Broadsheet detailing Berkshire preparations for invasion, 1803, D/ECw Z3.

Berkshire Militia Book, 1796-98, 1801-04, D/EP/4 05-07.

Presentments to the Court Leet acting as the Clerk of the Markets Court, Abingdon,1788, JM/4/2.

Petition relating to the holding of markets,Abingdon, 1797, A/AM 1.

'The Actual State of Preparation in the County of Berks...made in the Spring and Summer of the year 1798', Radnor MSS. D/ERa 07.

1.3.3 Buckinghamshire Record Office, Aylesbury

Quarter Sessions case books, 1802-28, QS/JC/1-6A.

Agreements to reduce consumption, 1796, Q/AM/1/1-131.

Correspondence regarding imposition of 5 Geo. IV c.74, 1825, Q/WM/C/1-9.

Correspondence concerning weights and measures, 1814-1930, Q/WM/Q/1-32.

Papers relating to the administration of weights and measures,1820-21, Q/AM/8/1.

Earl of Buckinghamshire MSS., Hobart Papers, 1801-4, D/MH.

'Plan for Establishing a System of Communication Throughout Each County', 1803, L/P 18.

'Posse Comitatus' Invasion returns, 1798, [2 volumes], L/P 15-16.

Invasion returns of Aylesbury and Ashenden Hundreds, L/P 17-18.

1.3.4 Cambridgeshire Record Office, Cambridge

Minute book of the Ely hundred and South Witchford Hundred Militia,1797-1802 , LP/297/1.

Minute Book on Defence of the Realm, 1803-04, LP /283.

Quarter Sessions order books, 1776-1786, QS/SO/8.

Quarter Sessions order books, 1786-1792, QS/SO/9.

Quarter Sessions order books, 1796-1810, QS/SO/11, 11A.

Quarter Sessions order books, 1810-1817, QS/SO/12.

County Treasurers accounts, two volumes, QS/10/4-5.

Ely and Witchford divisional accounts, 1811-33,[uncatalogued in 1984].

Printed notice regarding cost of relocating markets, [1787], P25/28/4.

Tolls of Newmarket market,1828, R54/10/9.

Lease of Cambridge market tolls and stallage, R56/14/2/39.

Opinion as to stallage and piccage tolls, Cambridge, 1838, Cambridge City Council MSS., Bundle 101, document 1 [provisional reference,1984].

Scheme for moving haymarket, butchery market and green market, 1787, P25/28/4.

Estimates of new market house, Royston, 1829, 296/B 112,113.

Valuation of market tolls, Baldock, Hertfordshire, 1838, 296/B 229.

Court of Pye-Powder records, 1760-1823, Cambridge Corporation MSS., Box II/5.

Invasion returns and correspondence for the Isle of Ely, 1804, 283/Militia /boxes 1-3.

1.3.5 Devon Record Office, Exeter

Report on the state of Tiverton market, 1824, Penny and Harward MSS., 1044 B/27.

Memorial of the inhabitants of Teignmouth concerning the Market, 1816, Courtney of Powderham MSS. 1508 M/Lond.[Special Subj.] /10 [NRA no.]

1.3.6 Dorset Record Office, Dorchester

Lease of Sunday tolls, Bridport, 1826, B3/050.

Agreement to let the Shambles in Bridport, 1826, B3/041.

List of places of abode of buyers in Dorchester market, 1789-1803, Dorchester Corporation MSS. B2 /25/2.

1.3.7 Essex Record Office, Colchester

Convictions for false weights, 1801, Brentford Petty Sessions, Q/AMw.

Presentments of Inspectors of Weights and Measures to 1797, Q/SBb/1.

Fines for false weights, 1830- , Q/FAb/1.

Invasion returns for various Hundreds and parishes,1803-05,D/DHa 01/10; D/P 18/3/102; D/P 3 6/17/5; D/P 242/17; D/D Cm 08; D/P 129/17/1.

1.3.8 Gloucestershire Record Office, Gloucester

Market profit accounts arranged by commodity, 1786-, Gloucester Corporation MSS. F 4/13.

Gloucester Corporation Minute books, 1778-1790, Gloucester Corporation MSS. B3 /11-12.

Invasion returns, 1803, Clifford of Frampton-on-Severn MSS., D/149/X29 /5-38.

1.3.9 Hampshire Record Office, Winchester

Quarter Sessions correspondence concerning the Defence of the Realm Act, 1801, Bolton MSS. 11/M/49/231.

Notebook of memoranda on waggons and carts mobilised in case of invasion, 1801, Bolton MSS. 11/M/49/243.

Invasion returns,1798/1801, Land Tax miscellaneous papers, B/XVIII a/5/3.

1.3.10 Hertfordshire Record Office, Hertford

Indentures for verification of weights and measures and delivery of standard weights, 1796-1853, QS/Misc. 1777 A, B94/4 ; L.Misc.968-9.

Returns of petty sessions for forfeitures and penalties for deficient

weights, 1833-44, QS./Misc. 1777, 1779, 1780, 1794.

Correspondence concerning weights and measures, various dates, QS./Misc. B 96/7.

County treasurers accounts, 1821-34, QS./Misc. 69.

County treasurers abstracts of accounts, 1836-1841, QS./Misc. B101.

Minutes of the Common Council of Hertford, c.1700-c.1900,[5 volumes], Borough of Hertford Corporation MSS. [no accession reference].

Accounts of militia baggage costs, 1796-8 and 1801, MIL/5.

1.3.11 Huntingdonshire Record Office, Huntingdon

Quarter sessions minute books, 1797-1835, HCR box 16, box 20B.

Quarter sessions proceedings book, 1797-99, HCR 49/1179.

Quarter sessions proceedings and letter book, 1816-19, HCR 49/1179b.

Quarter sessions proceedings book, 1800-08, HCR box 16 bundle II.

Quarter sessions letter book, 1820-23, HCR 49/1179 bundle IV.

Correspondence concerning the defence of the realm, c.1803, Hinchingbrooke MSS. 9/9-10.

Resolutions of Huntingdonshire General Meeting, Hinchingbrooke MSS. 9/13.

Huntingdon Town Sessions book, 1788-1817, Huntingdon Corporation MSS. Acc. 2525 box 15.

Tenders for the new market of Huntingdon, 1840, Huntingdon Corporation MSS. Acc. 2525, box 3, bundle 10.

Case on tolls in the Huntingdon market, 1827, Huntingdon Corporation MSS. Acc. 2525, box 3, bundle 6.

1.3.12 Kent Archives Office, Folkestone

Correspondence concerning weights and measures, 1834-6, Q/GA/1, Q/GB.

Treasurers accounts for the erection of a new market at Deal, 1802-7, De/FAt 1.

1.3.13 Norfolk Record Office, Norwich

Index of fines for false weights, 1819-29, Great Yarmouth Borough MSS. C 14/4.

Correspondence concerning weights and measures, 1800-25, Great Yarmouth MSS. C 34/14.

1.3.14 Oxfordshire Record Office, Oxford

Banbury borough market tolls and leases,1753-1836,BB VIII/vii; BB XXIX/i.

1.3.15 Somersetshire Record Office, Taunton

Militia papers and accounts, 1803-10, DD/RI box 1.

Correspondence regarding the implimentation of defence measures,1803-04, DD/RG 70-74.

Abstract of rates for carriage, 1804-05, DD/RG 68.

Lieutenancy and magistracy meetings minutes, 1798-1805, DD/CN 47/1.

Invasion returns, various parishes and hundreds, 1803-04, DD/RG 69-74; DD/RI box 1; DD/SAS SX19; DD/HY box 36.

1.3.18 Suffolk Record Office, (Ipswich) and (Bury St.Edmunds)

Copy of address on Saxmundham market, 1836, HA 18/EF/1,2.

Prospectus of Saxmundham Market,1836, HA 34/50/21/6.1(b).

Lease of Bildeston market, Suffolk, 1765, HA 61/436/247.

Summonses for the Court of Pie Poudre, Eye, 1819, Eye Borough MSS.K/5/21.

Journal and letterbooks,1769-1834,Bury St. Edmunds Corporation MSS.D4/1/4

Suffolk Sessions, Bury division, accounts ledger 1830-67, Q/F3.

Petitions to Suffolk sessions, various dates, Q/APw 1 (23).

Invasion returns for Barnardiston , 1803, and Blything Hundred, 1803, (Ipswich) HA 11/B1/3/2; (Bury) 613/19/1.

1.3.17 West Sussex Record Office, Chichester

Lease of the market, Rye Corporation MSS.121.

Invasion returns, various Hundreds and parishes, 1803, Add. MSS. 2736-7.

1.3.19 Wiltshire Record Office, Trowbridge

'Great Rolls' [sessions records] 1791-1821 [arranged by bundle].

Proclamations and printed form relating to invasion,1798-1801, 730/258.

Correspondence relating to weights and measures, 1834-40, QS/A1/155.

Minutes of the QS Finance Committee, 1831-72, QS/A1/720/3.

Minutes of the Quarter Sessions Committee'...for the regulation of County Expenditures', 1830-1, QS/A/720/2.

Minutes of the Quarter Sessions Committee on County Rates, 1817-41, QS/A1/720/1.

'Conditions for letting...the Tolls and Profits of the Corn Market',1802, Devizes Borough MSS., G/20/1/86.

Memorial of Devizes farmers and dealers concerning market,1804, Devizes Borough MSS. G/20/1/89.

Minute books of the Clerk of the Marlborough Market, Marlborough Town Council MSS. G 22/1/188/1-3.

1.3.20 Worcestershire Record Office, Worcester

Assignment of tolls of stallage, piccage etc., Borough of Evesham MSS. 7123/8/1.

2.CONTEMPORARY PERIODICALS (excluding newspapers)

Annals of Agriculture and Other Useful Arts Volumes 1-46 (London and Bury St.Edmunds,1784-1809).

Annual Register Volumes 1-73 (London,1758-1840).

Annual Review and History of Literature Volumes 1-7 (London,1802-08).

Annual Hampshire Repository Volumes 1-2 (Winchester,1799-1801).

Architectural Magazine, and Journal of Improvement in Architecture, Building and Furnishing Volumes 1-5 (London,1834-38.

Bristol and Bath Magazine Volumes 1-3 (Bristol, 1782-3).

Bristol Magazine and West of England Monthly Journal Volumes 1-2 (London, 1857-8).

British Cultivator and Agricultural Review Volumes 1-2 (London,1857-8).

British Farmers Magazine first series Volumes 1-10, second series Volumes 1-29 (London,1800-56).

The Cabinet Volumes 1-3 (Norwich,1794-95).

Communications to the Board of Agriculture Volumes 1-4 (London,1801-1805).

Country Constitutional Guardian and Literary Magazine Volume 1 (Bristol,1822).

The Country Spectator nos. 1-33 (Gainsborough,1792-93).

Edinburgh Review or Critical Journal Volumes 1-50 (Edinburgh,1802-1832).

Evans and Ruffys' Farmers Journal and Manufacturers and Traders Register Volumes 1-22 (London,1809-32).

Farmers Magazine Volumes 1-26 (Edinburgh,1800-25).

The Gentleman's Magazine and Historical Chronicle Volumes 1-303 (London, 1731-1922).

Ipswich Magazine Volumes 1-2 (Ipswich,1799-1800).

Kentish Register and Monthly Miscellany Volume 1 (Canterbury,1793).

Law Magazine... first series Volumes 1-55, second series Volumes 1-32; third series Volumes 1-4 (London,1830-1855).

Law Students' Magazine Volumes 1-6, second series (London,1844-54).

Legal Examiner (later Legal Examiner and Monthly Review of Jurisprudence) Volumes 1-3 (London,1831-3).

Legal Observer or Journal of Jurisprudence Volumes 1-32 (London,1830-46).

Letters and Papers of the Bath Society of Agriculture... Volumes 1-8 (Bath and London,1785-1796).

Monthly Review Volumes 1-10, second series volumes 1-40 (London,1790-1840).

Museum Rusticum et Commerciale; or Select Papers on Agriculture, Commerce, Arts and Manufactures Volumes 1-6 (London,1764-66).

The Pamphleteer Nos.1-58 (London,1813-28).

The Philanthropist Volumes 1-7, second series volume 1 (London,1811-29).

Quarterly Journal of Agriculture Volumes 1-13 (Edinburgh,1828-43).

Recreations in Agriculture, Natural History, Arts and Miscellaneous Literature [edited James Anderson] Volumes 1-6 (London,1799-1802).

Reports of the Society for Bettering the Condition and Increasing the Comforts of the Poor Volumes 1-6 (London,1802-15) [third edition].

Salopian Magazine and Monthly Observer Volumes 1-3 (Shrewsbury,1815-17).

Surveyor, Engineer and Architect Volumes 1-2 (London,1840-42).

Weekly Entertainer or Agreeable and Instructive Repository volume 38 (London,1801).

Westminster Hall Chronicle and Legal Examiner Volumes 1-2 (London,1835-6).

3.CONTEMPORARY NEWSPAPERS AND EPHEMERAL PRINTS

Bath Chronicle

Berrow's Worcester Journal

Brighton Gazette and Lewes Observer

Bury and Norwich Post

Cambridge Chronicle

Cambridge Intelligencer

Felix Farley's Bristol Journal

Huntingdon, Bedford, Cambridge & Peterborough Gazette and Northamptonshire General Advert -iser

Ipswich Journal

The Iris or Norwich & Norfolk Weekly Advertiser

London Gazette

Northampton Mercury

Norwich Chronicle

Norwich Mercury

Royal Cornwall Gazette

Salisbury and Winchester Journal

Times

4: CONTEMPORARY MAPS, ATLASES AND PLANS

The following is the list of cartographic sources used in the construction of Table 5.4 above. The items are listed by cartographer, short title, date of edition, dimensions and scale. Dimensions are given to the nearest quarter of a centimetre. See Mark A. Gray 'The Use of Small Scale Maps in Local History Research' Quest: Journal of the Avon Local History Society 9, (1979), p.9 for details of standard citation practice.

[Anon] 'A New Map of the University and City of Oxford...'1817 44.5x39cm., 1":200 yards.

[Anon] 'Borough of Plymouth Engraved by John Cooke...' in [Anon] Interesting Particulars Relative to that Great National Undertaking the Breakwater Now Constructing in Plymouth Sound Plymouth,1820. 11.5x8.75 cm., 1":0.166 miles.

[Anon.] 'Lancaster' in William Baines History, Directory and Gazetteer of the County Palatine of Lancaster. Liverpool, 1824-5. 15x24cm., 1":400 feet.

'Boston'in Thomas Moule The English Counties Delineated: Or a Topographical Description of England. London,1837 23.5x17.5cm., 1":1.75 chains.

'Plan of the Borough of Reading, Berks.1813' 1813 facing title page of John Man The History and Antiquities, Ancient & Modern, of the Borough of

Reading in the County of Berks.. Reading, 1816 plate 1, 1":2 furlongs.

'Plan of the Town and Port of Hastings..' 1824 in W.G.Moss The History and Antiquities of the Town and Port of Hastings. London,1824 facing page 1,7.5x11cm., 1":400 feet.

L. Andrews and M.Wren 'A Plan of the Town of St. Albans...' 1766 58x41cm., 1":16 perches.

---------- 'A Plan of the City of Canterbury...' 1768 61x48cm., 1":275 feet.

J.Andrews, A.Dury and W.Herbert 'A Topographical Map of the County of Kent' 1779 [inset plan of Sandwich, 31x23.5cm., 1":16 perches.

A. Armstrong '...the County of Rutland' [nd.,c.1770] [inset plan of Oakham, 11x14cm., 1":0.1875 miles.

I. Bryant 'A Plan of Kingston-upon-Hull...', 1784, 50x58cm., 1": 200 feet.

John Chapman and Peter Andre 'A Map of the County of Essex from an Actual Survey...' 1779 [inset plan of Colchester 45.5x27cm., 1":7.5 chains.

Charles Coates and Charles Tompkins 'Plan...of Reading', 1802, 50.5x63 cm., no scale.

G. Cole and J. Roper The British Atlas London,1810 all maps, 22x16.5cm., various scales.

R.Davis and John Cary 'A New Map of the County of Oxford' reprinted Oxford,1975 sheets IX, X, XIII, XIV , 1":3.2 chains.

Benjamin Donn 'A Plan of the City and Suburbs of Exeter...'in A Map of the County of Devon with the City & County of Exeter. London,1765 38x43.5cm., 1":25 poles.

---------- 'A Plan of the Town and Citadel of Plymouth' in ibid., same scale and proportions.

---------- 'A Plan of Stoke Town and Plymouth Dock' in ibid., same scale and proportions.

---------- 'Plan of the City of Bristol...' 1791 45x32.5cm., 1": 1 furlong.

S.Elliot 'Plan of the Towns and Harbour of Plymouth, Stonehouse, Devonport, Morice-Town, Stoke and the Environs of the County of Devon...'1830 55.5x42 cm., 1":1 furlong.

William Faden 'A Topographical Map of the County of Norfolk...'1797 66.5x 48cm., 1":8.25 chains.

---------- and John Prior '...Map of Leicestershire...'[inset plan], 23.5 x30.5cm., 1":175 yards.

Anthony Hochstetter 'Plan of the City of Norwich...' 1789 37.5x28.5cm., 1":7.5 chains.

Joseph Hodskinson 'The County of Suffolk Surveyed...'1783 [inset of Ipswich 25cm.x28cm.,1":120 yards] reprinted 1972 D.P.Dymond ed. Sussex Record Society volume 15 Ipswich,1972.

Thomas Jeffreys 'The County of Bedford Surveyed...' 1767 [inset plan of Bedford] 29x28cm., 1": 6 chains.

---------- 'The County of Buckingham Surveyed...'1788 [inset plan of Buckingham] 19.5x30cm.,1" :6 chains.

---------- 'The County of Oxford Surveyed...'1766-7 [inset plan of Oxford] 44.5x34cm., 1":6 chains.

---------- 'The County of Huntingdon Surveyed...'1804 [inset plan of Huntingdon] 33x28.5cm., 1":6 chains.

George Loader 'Plan of the City of Chichester...'1820 16.5x10cm., 1":90 yards in James Dalloway A History of the Western Division of the County of Sussex. London,1815: facing title page.

George Oakley Lucas 'Plan of the City of Salisbury' 1833 78.5x66 cm., 1": 5 chains.

John Manning 'Plan of the City and County of Norwich...' 1834 76x67cm., 1":11.5 chains.

J.Marchant 'Brightelmstone Surveyed...' 1825 43x32cm., 1":6 chains.

William Marrat 'Map of Lincoln...' 1817 55.5x39.5cm.,1"8 chains.

C.Harcourt Masters 'A Plan of the City of Bath...'1795 91x59cm., 1":90 yards.

Thomas Milne and William Faden 'Hampshire or the County of Southampton' 1790 inset plans, 27x24cm., 1":600ft.

E.Redman 'A New Map of the Vicinity of Worthing and Plan of the Town...' 1830 11.5x12cm., 1":1.5 furlongs.

J.Rocque A Topographical Survey of the County of Berks in Eighteenth Sheets London,1761 [inset plan of Reading, 15x17cm., 1":300 yards]

-------- 'A New Plan of the City and Suburbs of Bristol...'1759 52x73cm., 1": 300 feet.

-------- 'Plan of the City of Exeter' 1764 49x30cm., 1":300 feet.

-------- A Collection of the Plans of the Principal cities of Great Britain and Ireland. London,1764 various plans, generally 11.5x14cm., 1":200 feet, but of various dimensions.

Henry Swinden 'Plan of Great Yarmouth...'1779 70x37cm., 1":2.5 chains.

Issac Taylor 'New Map of the County of Hereford...' inset plan, 119x93 cm., 1":175 yards.

Thomas Warren 'Survey of the Borough of Bury St.Edmunds...'1767 64.5x93 cm., 1":200ft.

John Wood 'Plan of Warwick From and Actual Survey...' 1837 56.5x51cm.,1": 3 chains.

--------- 'Plan of King's Lynn...' 1830 52x73 cm., 1":3 chains.

5:CONTEMPORARY BOOKS AND PAMPHLETS

[Anon.] Enchiridion Legum: A Discourse Concerning the Beginnings, Nature, Difference, Progress and Use of Laws in General: And in Particular of the Common and Municipal Laws of England. London,1673.

'J.A.' The Law of Obligations and Conditions. London,1693.

[Anon.] Customs and Privileges of the Manor of Stepney and Hackney in the County of Middlesex. London,1736.

[Anon.] Museum Rusticum et Commerciale: or select papers on Agriculture, Commerce, Arts and Manufactures. London, 1765.

[Anon.] A Description of England and Wales, Containing an Account of Each County. London,1769-1770.

[Anon.] A Political Enquiry into the Consequences of Enclosing Waste lands and the Causes of the Present High Price of Butchers Meat being the Sentiments of a Society of Farmers in -----shire. London,1785.

[Anon.] Live and Let Live : A Treatise on the Hostile Rivalries between the Manufacturer and Landworker. London,[?1787].

[Anon] Points in Law and Equity, Selected for the Information, Caution and Direction of all persons concerned in Trade and Commerce. London,1791.

[Anon.] A Law Grammar; or an Introduction to the Theory and Practice of English Jurisprudence. London,1791.

'Un Officier Francais Emigre' Promenade Autour de la Grande Bretagne precede de Quelques Details sur la Campagne du Duc de Brunswick. Edinburgh,1795.

Courts of Justice.The Report of the Select Committee Appointed by the House of Commons to Enquire into the Courts of Justice in Westminster Hall, the Courts of Assize, the Civil Law Courts and the different Subordinate Offices attached to each Court. London,1799.

[?Gilbert Blane] Inquiry into the Causes and Remedies of the Late and Present Scarcity and High Prices of Provisions in a Letter to the Right Hon. Earl Spencer KG.. London,1800.

'Common Sense' The Cause of the Present Threatened Famine Traced to its Real Source viz. to the Actual Depreciation on our Circulating Medium, occassioned by the Paper Currency London,1800.

[Anon.] A Defence of Principle of Monopoly of Corn-factors or Middlemen and Arguments to prove that War does not produce a scarcity of the necessities of life. London,1805.

[Anon] Interesting Particulars Relative to that Great National Undertaking the Breakwater Now Constructing in Plymouth Sound. Plymouth,1820.

'Observer' An Estimate of Mr Brougham's Local Court Bill. London,1830.

[Anon] The Stranger's Guide to Cheltenham and Its Environs Cheltenham. Cheltenham, 1832.

Allen, T.H., The History of the County of Lincoln from the earliest period to the present time. London,1834.

Amos, A. and Ferard, J., A Treatise on the Law of Fixtures and other Property Partaking of both a Real and a Personal Nature. London,1827.

Anderson, J., Essays Relating to Agriculture and Rural Affairs. 4th edn., 4 vols., London,1797.

Baines, W., A Letter to the Right Honourable Lord Tenterden, Lord Chief Justice of the Court of King's Bench etc. etc. on the Bill for Establishing Courts of Local Jurisdiction. London,1830.

Beatniffe, R., The Norfolk Tour: or Traveller's Pocket Companion; Being a Concise Description of All the Principal towns,Noblemen's and Gentlemen's Seats and other remarkable places in the County of Norfolk. 6th edn., Norwich,1808.

Bell, R., A Treatise on Leases Explaining the Nature and Effect of the Contract of Lease, and the Legal Rights enjoyed by the Parties. 3rd edn., Edinburgh,1820.

Blackstone, W., Commentaries on the Laws of England. 5th edn. 4 vols. London,1773,

Boys, J., A General View of the Agriculture of the County of Kent. London,1796.

Brady, J.H., The New Law of the Court of Requests. London,1835.

Brewer, G., The Rights of the Poor Considered; with the Causes and Effects of Monopoly and a Plan of Remedy by Means of a Popular Progressive Excise. London,1800.

Burn, R., Ecclesiastical Law. 3rd edn. 2 vols. London,1775.

---------- and John Burn, A New Law Dictionary: Intended for General Use as well as for Gentlemen of the Profession. London,1792.

Chambers, C.H., A Treatise on Leases and Terms for Lives. London,1819.

Chambers, Sir R., A Treatise in Estates and Tenures. ed. Sir Charles Harcourt London,1824.

Chetwynd, J., A Treatise Upon Fines: to which is added some General Observations on the nature of Deeds leading and declaring the Use of Fines and Recoveries. London,1773.

Chitty, J., A Treatise on the Law of the Prerogatives of the Crown; and the relative duties of the subject. London,1820.

---------- A Collection of Statutes of Practical Utility London,1837.

Clarke, E.D., A Tour Through the South of England, Wales and Part of Ireland, made during the Summer of 1791. London,1793.

Colquhoun, P., A Treatise on the Functions and Duties of a Constable. London,1803.

Cooke, G.A., Topographical and Statistical Description of the County of Kent. London,[?1801].

Cripps, H.W., A Practical Treatise on the Laws Relating to the Church and Clergy London,1845.

Cruise, W., An Essay on the Nature and Operation of Fines. London,1783.

Cunningham, T., Introduction to the Knowledge of the Laws and Constitutions of England. London,[?1812].

Dalloway, J., A History of the Western Division of the County of Sussex. London,1815.

Dearn, T.W.D., An Historical, Topographical and Descriptive Account of the Weald of Kent. Cranbrook,1814.

Dirom, A., An Inquiry into the Corn Laws and Corn Trade of Great Britain and their Influence on the Prosperity of the Kingdom. Edinburgh,1796.

Dodd, S., An Historical and Topographical Account of the Town of Woburn, Its Abbey and Vicinity. Woburn,1818.

Dugdale, Sir W., History and Antiquities Relative to the Following Curious Subjects: namely , the Origin of Government; Beginning of Laws; Antiquity of Our Laws in England. 11th edn. London, 1780.

Dunkin, J., The History and Antiquities of Dartford with Topographical Notices of the Neighbourhood. London,1844.

Dyde, J., The History and Antiquities of Tewkesbury. Tewkesbury, 1798.

Enfield, W., A Compendium of the Laws and Constitution of England. London,1809.

English, H., A Complete View of the Joint Stock Companies formed during the Years 1824 and 1825; being six hundred and twenty four in number. London,1827.

Fearne, C., An Essay on the Learning of Contingent Remainders and Executory Devises. London,1772.

Fellowes, H., The Laws Respecting Copyhold and Court Keeping. London,1799.

Fisher, R.B., A Practical Treatise on Copyhold Tenure with the Methods of Holding Court Leets, Courts Baron and other Courts. London,1794.

Fonblanque, J., A Treatise of Equity. London,1793.

Garrow, D.W., The History and Antiquities of Croydon. Croydon,1818.

Godschall, W.M., A General Plan of Parochial and Provincial Police. London,1787.

Grant, J., Essays on the Origin of Society, Language, Property, Government, Jurisdiction, Contracts and Marriage. London,1785.

Harding, Lt.Col., The History of Tiverton in the County of Devon.London,1845.

Hodson, S., An Address to the Different Classes of Persons in Great Britain on the Present Scarcity and High Price of Provisions. London,1795.

Holthouse, H.J., A New Law Dictionary. London,1829.

Hunt, R., A Word On The Times To Those Who Buy: Also Five Minutes Advice Before Going To Market To Those Who Sell. 2nd edn. Shrewsbury,1800.

Hursfield, T.W., The History, Antiquities and Topography of the County of Sussex. 2 vols. Lewes,1835.

Illingworth, W., An Inquiry into the Laws Antient and Modern respecting Forestalling, Regrating and Ingrossing. (London,1800).

Jacob, G., A New Law Dictionary: containing the interpretation and definition of words and terms used in the Law. 9th edn. London,1772.

---------- Every Man His Own Lawyer; or a Summary of the Laws of England in a New and Instructive Method. London,1772.

---------- The Complete Court Keeper; or Land Steward's Assistant. 8th edn. London,1819.

Keith, G.S., Different Methods of Establishing an Uniformity of Weights and Measures Stated and Compared. London,1817.

Kelly, P., Metrology; or An Exposition of Weights and Measures, Chiefly Those of Great Britain and France. London,1816.

Lawn, B., The Corn Trade Investigated and the Shocking System Exposed. Bath,1800.

[Lawrence, J.], The New Farmer's Calendar. 3rd edn. London,1801.

Lewis, S., A Topographical Dictionary of England. 7th edn., 4 vols. London,1849.

Lipscombe, G., A Journey into Cornwall Through the Counties of Southampton, Wilts., Dorset and Somerset and Devon. Warwick,1799.

Lipscombe, G., The History and Antiquities of Buckinghamshire London, 1847.

[Loudon, J.C.], An Immediate and Effectual Mode of Raising the Rental of the Landed Property of England. London,1808.

Luder, A., Tracts on Various Subjects in the Law and History of England. London,1810.

Lysons, D. and S., Magna Britannia being a Concise Topographical Account of the Several Counties of Great Britain. London,1806.

McCulloch, J.R., Treatises and Essays on Subjects Connected with Economical Policy. Edinburgh,1833.

MacGatchen, F.S., The Law of Fairs and Markets. London,1859.

Macpherson, D., Annals of Commerce 4 vols., London,1805.

Maddy, E., Digest of Cases Argued and Determined in the Arches and Prerogative Courts of Canterbury, the Consistory Court of London and the High Court of Arches. London,1835.

Malham, Revd. J., The Scarcity of Wheat Considered; or a Statement of the Impolicy of the Late and Present Price of Wheat. Salisbury,1800.

Man, J., The History and Antiquities, Ancient & Modern, of the Borough of Reading in the County of Berks.. Reading,1816.

Marriot, W., The Country Gentleman's Lawyer; and the Farmer's Complete Law Library London,1808.

Marshall, W., The Rural Economy of Gloucestershire. 2nd edn., London,1796.

---------- The Rural Economy of the West of England including Devonshire and parts of Somersetshire Dorsetshire and Cornwall. 2 vols., London,1796.

Matthews, J., Remarks on the Cause of the Scarcity and Dearness of Cattle, Swine, Cheese etc. etc.. London,1799.

Matthews, W., A Dissertation on Rural Improvements; Being the Substance of an Introduction to the Ninth Volume of the Letters and Papers of the Bath and West of England Society. Bath,1800.

Maugham, R., Oulines of the Jurisdiction of all the Courts in England and Wales. London,1838.

Meriton, G., Land-Lords Law: A Treatise Very Fit for Perusal of all Gentlemen, and others. London,1665.

Moseley, J., Law of Inferior Courts for the Recovery of Small Debts. London,1845.

Moss, W.G., The History and Antiquities of the Town and Port of Hastings. London,1824.

Hervey, Viscount Mountmorres, Impartial Reflections upon the Present Crisis. London,1796.

Mudie, R., Hampshire Its Present and Past Condition. Winchester, 1838.

Naismith, J., An Examination of the Statutes now in force relating to the Assize of Bread. Wisbech,1800.

Paul, J., The Parish Officer's Complete Guide. 6th edn., London,1793.

Pearce, T., The Poor Man's Lawyer; or, Laws Relating to the Inferior Courts Laid Open. London,1755.

Pennant, T., A Journey from London to the Isle of Wight, 2 vols., London,1801.

Platt, T., A Treatise on the Law of Leases; with Forms and Precedent. London,1847.

Potts, T., A Compendious Law Dictionary. London,1803.

Prideaux, H., Directions to Churchwardens for the Faithful Discharge of their Duty ed. Robert P. Tyrwhitt, 8th edn., London,1830.

Pulling, A., A Practical Treatise on the Laws, Customs and Regulations of the City and Port of London as settled by Charter, Usage, By-law or Statute (London, 1842).

Ram, J., An Outline of the Law of Tenure and Tenancy containing the first principles of the Law of Real Property. London,1825.

Riddell, H. and John Warrington Rodgers An Index to the Public Statutes from 9 Hen. III to 10 & 11 Vict. Inclusive. London,1848.

Ritson, J., The Jurisdiction of the Court Leet. London,1809.

Robinson, T., The Common Law of Kent: or, The Customs of Gavelkind. London,1741.

Sheppard, W., Of the Office of the Clerk of the Market, or Weights and Measures and the Laws of Provision for Man and Beast. London,1665.

Spence, G., Essay on the Origin of the English Laws and Institutions; read to the Society of Lincoln's Inn, Hilary Term 1812. London,1812.

Spiker, S.H., Travels Through England, Wales and Scotland in the Year 1816. London,1820

Stockdale, F.W.L., Excursions in the County of Cornwall. London,1824.

Sydenham, J., The History of the Town and County of Poole. Poole,1839.

Toone, W., A Chronological Record of the Remarkable Public Events, Political, Historical, Biographical, Literary, Domestic & Miscellaneous during the Reigns of George the Third and Fourth and His Present Majesty. London,1834.

Trusler, J., The Country Lawyer. London,1786.

Turton, Sir T., An Address to the Good Sense and Candour of the People in Behalf of the Dealers of Corn. 2nd edn., London,1800.

Vancouver, J., An Enquiry into the Causes and Production of Poverty , and the State of the Poor, Together with the Proposed Means for their Effectual Relief. London, 1796.

Waddilove, A., A Digest of Cases Decided in the Court of Arches, the Prerogative Court of Canterbury, the Consistory court of London and on Appeal therefrom to the Judicial Committee of the Privy Council. London,1849.

Watson, W., An Historical Account of the Ancient Town and Port of Wisbech. Wisbech,1827.

Waylen, J., Chronicles of The Devizes. London,1839.

White, G., The Natural History and Antiquities of Selbourne in the County of Southampton. London,1789.

Williams, T.W., A Compendious Digest of the Statute Law from Magna Carta to the Twenty-Seventh Year of the His present Majesty King George III inclusive. London, 1787.

Wills, C., A Short Historical Sketch of the Town of Barnstaple. Barnstaple,1855

Wodderspoon, J., Memorials of the Ancient Town of Ipswich in the County of Suffolk. Ipswich and London,1850.

Wooddeson, R., Elements of Jurisprudence Treated of in the Preliminary Part of a Course of Lectures of the Laws of England. London,1783.

---------- A Systematical View of the Laws of England; as treated of in a course of Vinerian Lectures Read at Oxford. London,1792-3.

Wright, Sir M., An Introduction to the Law of Tenures. London,1730.

Young, A., The Farmer's Guide to Hiring and Stocking Farms. London,1770.

Young, D. Agriculture, the Primary Interest of Great Britain. Edinburgh,1788

6 SECONDARY PUBLICATIONS

6.1 BOOKS AND ARTICLES

[Anon.] 'Notes' Law Quarterly Review, 4, (1888), 119-120.

[Anon.] Land Transfer.Published by Order of the Bar Committee. London,1886.

'P.V.B.' 'Covenants in Leases by Estoppel' Law Quarterly Review, 83, (1967), 21.

'E.F.' 'Evolution in the Law of Contracts and the Covenant to Repair' Law Times, 144, (1918), 418-421.

Adams, J.B., 'Two Theories of Consideration' Harvard Law Review, 12, (1899), 515-531.

Adams, R.N., Paradoxical Harvest: Energy and Explanation in British History, 1870-1914. Cambridge,1982.

Aivazian, V. and Jeffrey L. Callen, 'The Coase Theorem and the Empty Core' Journal of Law and Economics, 25, 1, (1981), 175-81.

Alchian, A. and Demsetz, H., 'Production, Information Costs and Economic Organisation' American Economic Review, 62, (1972), 777-795.

de Alessi, L., ' Property Rights, Transaction Costs and X-efficiency: an essay in economic theory' American Economic Review, 73, (1983), 64-81.

Alford, B.W.E., 'Entrepreneurship, business performance and industrial development' Business History, 19, (1977), 116-138.

Alston, L., Costs of Contracting and the Decline of Tenancy in the South, 1930-1960. New York and London, 1985.

Alt, G.P., 'The Origin and Reason for the Consideration Rule in the Law of Contract' American Law Review, 56, (1922), 345-364.

Anderson, T.L. and Hill, P.J.,'The Evolution of Property Rights: A Study of the American West' Journal of Law and Economics, (1975), 18, 163-179.

'Arge, R. et al., 'Coase Theorem Symposium' Natural Resources Journal, 13, 973, 557-560.

rnold, T., Introductory Lectures on Modern History. London, 1842.

rrow, K.J., 'Political and Economic Evaluation of the Social Economics of utput' in Julius Margolis ed The Analysis of Public Output. New York,1970. -23.

---------- 'The Property Rights Doctrine and Demand Revelation under ncomplete Information'in Melvin J.Boskin ed Economics and Human Welfare: ssays in Honor of Tibor Skitovsky. New York, 1979, 23-39.

---------- and Hahn, F.H., Competitive Analysis. (San Francisco and dinburgh,1971.

rthurs, H.W.,'Without the Law: Courts of Local and Special Jurisdiction in ineteenth Century England' Journal of Legal History, 5, (1984), 130-149.

---------- 'Special Courts, Special Law : Legal Pluralism in Nineteenth entury England' in G.R.Rubin and David Sugarman eds Law Economy and ociety, 1750-1914: Essays in the History of English Law. Abingdon,1984, 30-411.

---------- 'Without the Law': Legal Pluralism and Administrative Law in ineteenth Century England. London,1986.

Ashton,T.S.,An Economic History of England : the 18th Century. London,1955.

---------- Economic Fluctuations in England 1700-1800. Oxford,1959.

Association of American Law Schools ed., Select Essays in Anglo-American Legal History. Cambridge,Mass.,1909, vol. 3, 259-303.

Atiyah, P.S.,The Rise and Fall of the Freedom of Contract. Oxford,1979.

---------- Essays on Contract. Oxford,1986.

Ault, D.E. and Rutman, G.L. 'The Development of Individual Rights to Property in Tribal Africa' Journal of Law and Economics, 22, (1979), 163-182.

Backhaus, J. and Hans G. Nutzinger Eigentumsrechte und Partizipation. Frankfurt,1981.

Ballantine, H., 'Is the Doctrine of Consideration Senseless and Illogical?' Michigan Law Review, 11, (1913), 423-434.

Barzel, Y. 'Some Fallacies in the Interpretation of Information Costs' Journal of Law and Economics, 20, (1977), 291-307.

Basu,K., Eric Jones and Ekkehart Schlict 'The Growth and Decay of Custom : The Role of the New Institutional Economics in Economic History' Explorations in Economic History, 24, (1987), 1-21.

Beckerlegge, J. 'Four Hundred Years of Municipal Finance' Annual Reports and Transactions of the Plymouth Institution, 17, (1928/9 - 1935/6).

Behrens, P. 'Aspekte einer Okonomischen Theorie des Rechts' Rechtstheorie: Zeitschrift fur Logik, Kybernetik und Sociologie des Rechts, Bd.12, (1981), 472-490.

Berg, M., Pat Hudson and Michael Sonenscher eds Manufacture in town and country before the factory. Cambridge,1983.

Bigelow, M.M., A Treatise on the Law of Estoppel and Its Application to Practice. 5th edn., Boston,1890.

Blaug, M., The methodology of economics, or how economists explain. Cambridge, 1980.

Boddy, M. and West, J., Weymouth: an illustrated history. Wimbourne, 1983.

Bottomley, A.F.,(ed) The Southwold Diary of James Maggs, 1818-1876 Volume 1. Suffolk Records Society vol.25, Woodbridge, 1983.

Bower, G.S., The Law Relating to Estoppel by Representation. edited Sir Alexander Kingcome Turner 3rd edn. London,1977.

Braudel, F. Afterthoughts on Material Civilization and Capitalism. translated by Patricia Ranum Baltimore and London,1977.

Brown, R.G. The Law Relating to Covenants Running with the Land. London,1909 82-99.

Brownstein, B.P., 'Pareto optimality, external benefits and public goods : a subjectivist view' Journal of Libertarian Studies, 4,(1980), 93-106.

Buchanan, J. 'The Coase Theorem and the Theory of the State' Natural Resources Journal, 13, (1973), 579-594.

---------- and Gordon Tullock The Calculus of Consent. Ann Arbor,1965.

von Bulow, G., 'Zur wirdigung der Historischen Schule der Nationaloekonomie' Zeitschrift fur Sozialwissenschaft, 7, (1904).

Burke, P. 'Revolution in Popular Culture' in Roy Porter and Mikulas Teich eds Revolution in History, pp.206-225. Cambridge,1986.

Burton, J. 'Externalities, Property Rights and Public Policy: Private Property Rights or the Spoilation of Nature' in Steven N.S.Cheung The Myth of Social Cost:a critique of welfare economics and the implications for public policy. IEA Hobart Paper 82 London,1978.

Bush, G., Bristol and Its Municipal Government 1820-1851. Bristol,1976.

Bushaway, B., By Rite: Custom, Ceremony and Community in England 1700-1880. London,1982.

Calabresi, G. and Douglas Melamed 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' Harvard Law Review, 85, 1972, 1089-1128.

---------- 'The New Economic Analysis of Law' Proceedings of the British Academy, 68, (1982), 85-108.

Cassels, J.W.S., Economics for Mathematicians. Cambridge,1981.

Chalkin, C.W. 'Capital Expenditure on Building for Cultural Purposes in Provincial England, 1730-1830' Business History, 22, (1980), 37-57.

Chaloner, W.H., The Social and Economic Development of Crewe,1780-1923. Manchester,1950.

Chandler, A.D., The Visible Hand: The Managerial Revolution in American Business. Cambridge, Mass.,1977.

---------- 'Comparative Business History' in D.C.Coleman and Peter Mathias eds., Enterprise and History : Essays in Honour of Charles Wilson Cambridge,1984, 3-26.

---------- 'Comment' in Keiichiro Nakagawa ed Strategy and Structure in Big Business: Proceedings of the First Fuji Conference Tokyo,n.d.

---------- and Herman Daems 'Administrative Coordination,Allocation and Monitoring: Concepts and Comparisons' in Norbert Horn and Jurgen Kocka eds. Recht und Entwicklung der Grosunternehmen im 19.und fruhen 20. Jahrhundert, Wirtschafts-, sozial- und rechtshistorische Untersuchungen zur Industrialisierung in Deutschland, Frankreich, England und den USA. Gottingen,1979, 28-52.

Cheung, S.N.S. 'Transaction Costs, Risk Aversion and the Choice of Contractual Arrangements ' Journal of Law and Economics, 12, (1969), 23-42.

---------- 'The Structure of a Contract and the Theory of a Non-Exclusive Resource' Journal of Law and Economics, 13, (1970), 49-70.

Clapham, J.H., An Economic History of Modern Britain : The Early Railway Age, 1820-1850. 2nd edn. Cambridge,1930.

Clark, C., The Conditions of Economic Progress. 2nd edn. London, 1957.

Coase, R.H., 'The Nature of the Firm' Economica, 4,1937, 386-405.

---------- 'The Problem of Social Cost' Journal of Law and Economics, 3, 1960, 1-44.

Coleman, D.C., History and the Economic Past :An Account of the Rise and Decline of Economic History in Britain. Oxford,1987.

---------- 'The Uses and Abuses of Business History' Business History, 29,1987, 141-156.

Cornwall, R.R. 'Marketing costs and imperfect competition in general equilibrium' in G.Schwodiauer ed Equilibrium and Disequilibrium in Economic Theory. Dordrecht, 1977, 239-254.

Crocker, T.D. 'Externalities,Property Rights and Transactions Costs : An Empirical Study' Journal of Law and Economics, 14, (1971), 451-464.

Cross, J.G., The Economics of Bargaining. New York and London, 1969.

Cunningham, C.,Victorian and Edwardian Town Halls. London,1981.

Cunningham, W.,The Progress of Capitalism in England. Cambridge, 1916.

---------- The Growth of English Industry and Commerce in Modern Times Part II Volume 3 Cambridge,1917.

Dahlman, C. 'The Problem of Externality' Journal of Law and Economics, 22, 1979, 141-162.

---------- The Open Field System and Beyond. Cambridge,1980.

Daems, H. 'The Economics of Hierarchical Organisation' in Papers of 8th International Economic History Congress :B1 Economic Theory and History, Budapest,1982, 74-87.

Davies, M.F., Life in an English village: An economic and historical survey of the parish of Corsley in Wiltshire. London,1909.

Deane, P. and W.A.Cole British Economic Growth 1688-1959: Trends and Structure. Cambridge,1967.

Demsetz, H. 'The Exchange and Enforcement of Property Rights' Journal of Law and Economics, 7, (1964), 11-26.

---------- 'Towards a Theory of Property Rights' American Economic Review, Papers and Proceedings, 57, (1967), 347-359.

---------- 'Why Regulate Utilities ?' Journal of Law and Economics, 11, 1968, 55-65.

---------- 'The Cost of Transacting' Quarterly Journal of Economics, 82, 1968, 33-53.

---------- 'Information and Efficiency: Another Viewpoint' Journal of Law & Economics, 12, (1969), 1-22.

---------- Economic, Legal and Political Dimensions of Competition. Amsterdam 1982.

Dicey, A.V., Can English Law Be Taught at the Universities? London,1883.

Dolbear, F.T. 'On the Theory of Optimum Externality ' American Economic Review, 57, (1967), 90-103.

Dow, G.K., 'The function of authority in transaction cost economics' Journal of Economic Behaviour and Organisation, 8, (1987), 13-38.

Downs, A., An Economic Theory of Democracy. New York 1957.

Elbaum, B. and William Lazonick 'An Institutional Perspective on British Decline' in Bernard Elbaum and William Lazonick eds., The Decline of the British Economy. Oxford,1986, 1-24.

Fechner, E. 'Der Begriff des Kapitalistischen Geistes bei Werner Sombart und Max Weber und die soziologischen Grundkatagorien Gemeinschaft und Gesellschaft' Weltwirtschaftliches Archiv, Bd.30, (1929), 194-211.

Field, A.J. 'The Problem with Neoclassical Institutional Economics : A Critique with Special Reference to the North/Thomas Model of pre-1500 Europe' Explorations in Economic History, 18, (1981), 174-198.

---------- 'Microeconomics, Norms and Rationality' Economic Development and Cultural Change, 32, (1984), 683-711.

Fifoot, C.H.S.,Lord Mansfield. London,1936.

Fisher, F.M. Disequilibrium foundations of equilibrium economics. Cambridge,1983.

Floud,R. and Donald McCloskey eds., The Economic History of Britain since 1700 Volume 1: 1700-1860. Cambridge,1981.

Foley, D.K. 'Economic equilibrium with costly marketing' Journal of Economic Theory. 2, (1970), 276-291.

Fourastie, J., Le Grande Espoir du XXeme siecle. Paris, 1949

Francis, D. et al. Power Efficiency and Institutions: A Critical Appraisal of the 'Markets and Hierarchies Paradigm'. London,1983.

Fraser, D., (ed) Municipal Reform and the Industrial City. Leicester,1982.

Fried, C., Contract as Promise: A Theory of Contractual Obligation. Cambridge,Mass.,1981.

Fremantle, A.F., England in the Nineteenth Century Volume 1: 1801-1805. 2 vols., London,1929

Furubotn, E. 'Property Rights and Economic Theory: A Survey of Recent Literature' Journal of Economic Literature, 10, (1972), 1137-1162.

---------- and Svetozar Pejovich 'Introduction: The New Property Rights Literature' in Eirik G.Furubotn and Svetozar Pejovich eds.,The Economics of Property Rights. Cambridge, Mass.,1974.

Gardiner, D., Historic Haven: The Story of Sandwich. Derby,1954.

Gardner, S., 'The proprietory effect of contractual obligations under Tulk v.Moxhay and de Mattos v.Gibson ' Law Quarterly Review, 98, (1982), 295-6.

Gilmore, G., The Death of Contract. Columbus,1974.

Goldberg, V.P., 'Commons, Clark and the emerging post-Coasian law and economics' Journal of Economic Issues, 10, (1976), 877-894.

Gourvish, T.R. 'British Business History and the Transition to a Corporate Economy: Entrepreneurship and Management Structures' Business History, 29, 1987, 18-45.

Graham, M. 'The Building of Oxford Covered Market' Oxoniensia, 44, 1979, 81-91.

Gray, A. and A.E. Thompson The Development of Economic Doctrine: An Introductory Survey. 2nd edn, London,1980.

Gray, M.A. 'The Use of Small Scale Maps in Local History Research' Quest: Journal of the Avon Local History Association, 9, (1979), 5-9.

---------- 'Theory and History in the Economic History of Britain' Scottish Journal of Political Economy, 35, (1988), 92-97.

Green, E.J. 'Equilibrium and Efficiency under Pure Entitlement Systems' Public Choice, 39, (1982), 185-212.

Grigg, D., The Agricultural Revolution in South Lincolnshire. Cambridge, 1966.

Gruchy, A.G. Contemporary Economic Thought:The Contribution of Neo-Institutional Economics. London,1973.

---------- 'Neoinstitutionalism and the Economics of Dissent' Journal of Economic Issues, 3, (1969), 3-17.

Hahn, F.H., Equilibrium and Macroeconomics. Oxford, 1984.

---------- 'Equilibrium with transaction costs' Econometrica, 39, 1971, 417-439.

Halevy, E., A History of the English People in 1815. Harmondsworth, 1937.

Hammond, J.L. and B., The Village Labourer 1760-1832. London, 1911.

Hannah, L. ed Management Strategy and Business Development: An Historical and Comparative Study. London, 1976.

---------- The Rise of the Corporate Economy. 2nd edn. London, 1983.

Hart, G., A History of Cheltenham. Leicester, 1965.

Harte, N.B. ed The Study of Economic History. London, 1971.

Hay, D. 'Controlling the English Prosecutor' Osgoode Hall Law Journal, 21, 1983.

------ 'The criminal prosecution in England and its historians' Modern Law Review, 47, (1984), 12-14.

Heller, W. 'Transactions with Set-Up Costs' Journal of Economic Theory, 4, (1972), 465-478.

---------- and R.M.Starr 'Equilibrium with non-convex transaction costs: Monetary and non-monetary economies' Review of Economic Studies, 43 (1976), 195-215

Helm, D., 'Price Formation and the Costs of Exchange' in Mauro Baranzini and Roberto Scazzieri eds Foundations of Economics:Structures of Inquiry and Economic Theory. Oxford,1986, 205-220.

Hess, J.D., The Economics of Organisation. Amsterdam,1983.

Hill, C.W.L. and Kim, W.C., 'Searching for a dynamic theory of the multinational enterprise: a transaction cost approach' Strategic Management Journal, 9, (1988), 93-104.

Hill, Sir F., Georgian Lincoln. Cambridge,1966.

Hirschleifer,J., 'The private and social value of information and the reward to inventive activity' American Economic Review, 61, (1971), 561-574.

Hirschman, A.O. 'Rival Interpretations of Market Society: Civilizing, Destructive or Feeble ?' Journal of Economic Literature, 20 1982, 1463-1484.

Hoffman,E. and Spitzer, M.L., 'Experimental Tests of the Coase Theorem with Large Bargaining Groups' Journal of Legal Studies, 15, (1986), 149-171.

Holden, A. 'Greenwich Market' Transactions of the Greenwich and Lewisham Antiquarian Society, 7, (1961), 15-24.

Holdworth, W.A. 'Debt, Assumpsit and Consideration ' Michigan Law Review, 11, (1913), 347-357.

---------- A History of the English Law. edited A.L. Goodhart and H.G.Hanbury, vols. 8-14 London, (1925-1964).

---------- 'Formation and Breach of Contract' 1933 in W.A.Holdsworth Essays in Law and History. ed. A.L.Goodhart and H.G.Hanbury Oxford,1946.

Honkapohja, S. 'Studies in the General Equilibrium Theory of Money and Transaction Cost' Annales Academiae Scientiarium Fennicae, Dissertationes Humanorium, 21 Helsinki,1979.

Horwitz, M. 'The Conservative Tradition in the Writing of American Legal History' American Journal of Legal History, 17, (1973), 275-294.

---------- The Transformation of American Law. Cambridge,Mass.,1976.

Hull, F., (ed.) A Calendar of the White and Black Books of the Cinque Ports, 1432-1955. (London,1966).

Hutchinson, D. and Stephen Nicholas 'Modelling the Growth Stages of British Firms' Business History, 29, (1987), 46-64.

Hyde, F.E. 'Economic Theory and Business History .A Comment on the theory of profit maximisation' Business History, 5, (1962-4), 1-10.

Jacquemin, A., The New Industrial Organisation: Market Forces and Strategic Behaviour. Oxford,1987.

Jaynes, G.D. 'Economic Theory and Land Tenure' in Hans P.Binswanger and Mark R. Rosenweig eds., Contractual Arrangements,Employment and Wages in Rural Labor Markets in Asia. New Haven and London,1984, 43-45.

Johnsen, D.B. 'The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians' Journal of Legal Studies, 15, (1986), 41-67.

Jones, E.L. 'Institutional Determinism and the Rise of the Western World' Economic Inquiry, 12, (1974), 114-124.

Jones, H.W., 'The jurisprudence of contracts' in Gabriel M.Wilner ed., Jus et societas: essays in tribute to Wolfgang Friedmann. The Hague,1979, 169-180.

Jones, S.R.H. 'Technology, Transaction Costs and the Transition to Factory Production in the British Silk Industry, 1700-1870' Journal of Economic History, 47, (1987), 71-96.

Kalman, M., 'Consumption Theory , Production Theory and Ideology in he Coase Theorem' Southern California Law Review, 53, (1979), 669-698.

---------- 'Spitzer and Hoffman on Coase: a brief rejoinder' Southern California Law Review, 53, (1980), 1215-1223.

Klein,B., Robert Crawford and Armen Alchian 'Vertical integration, appropriable rents and the competitive contracting process' Journal of Law and Economics, 21, (1978), 297-326.

Keynes, J.M., The Economic Consequences of the Peace. London,1919.

Koot, G.M., English historical economics, 1870-1926: the rise of economic history and neomercantilism. Cambridge,1987.

Kronman, A.T., 'Contract Law and Distributive Justice' Yale Law Journal, 89, 1980, 472-511.

Kuczynski, J., Zur Geschicte der Wirtschaftsgeschichtsschreibung Berlin, 1978

Kurz, M. 'Equilibrium in a finite sequence of markets with transaction costs' Econometrica, 42, (1974), 1-20.

-------- 'Equilibrium with transaction cost and money in a single market exchange economy' Journal of Economic Theory, 7, (1974), 418-452.

-------- 'Arrow-Debreu equilibrium of an exchange economy with transaction cost' International Economic Review, 15, (1974), 699-717.

Langlois, R.N. 'Internal Organisation in a Dynamic Context: some theoretical considerations' in Meheroo Jussawalla and Helene Ebenfield eds. Communication and Information Economics : New Perspectives. Amsterdam, 1984.

Levi, M. and North, D.C., 'Toward a Property Rights Theory of Exploitation' Politics and Society, 11, (1982), 315-320.

Libecap, G.D. 'Property Rights in Economic History: Implications for Research' Explorations in Economic History, 23, (1986), 227-252.

Leibenstein, H., Beyond Economic Man: A New Foundation for Microeconomics. 2nd edn., Cambridge, Mass., 1980.

Liebhafsky, H.H. 'The Problem of Social Cost: An Alternative Approach' Natural Resources Journal, 13, (1973), 615-676.

---------- 'Price Theory as Jurisprudence - Law and Economics Chicago-style' Journal of Economic Issues, 10, (1976), 23-43.

---------- 'Allan Gruchy, Neoinstitutionalist' in John Adams ed. Institutional economics: Contributions to the Development of Holistic Economics - Essays in Honor of Allan G.Gruchy. Boston, The Hague and London,1980.

Lindgren, R., The Social Philosophy of Adam Smith. The Hague,1973.

Lucas, P., 'On Edmund Burke's doctrine of prescription: or an old appeal from the new to the old lawyers' Historical Journal, 11 (1968), 35-68.

McClelland, P.D. 'Cliometrics versus Institutional History' Research in Economic History. ed. Paul Uselding 3,1978, 369-378.

McCloskey, D.N.,Econometric History. London,1987.

McElroy, R.G.,Impossibility of Performance. Cambridge,1941.

MacMahon, K.A. 'The Street in Eighteenth Century Kingston-upon-Hull' Publications of the Georgian Society of East Yorkshire, 5, (1961), 43-66.

MacNeil, I.R., 'Essays on the Nature of Contract' North Carolina Central Law Review, 10, (1979), 159-200.

Malcolmson, R.W. Popular Recreations in English Society 1700-1850. Cambridge,1973.

Maloney, J., Marshall, Orthadoxy and the Professionalization of Economics. Cambridge, 1985.

Manchester, A.H., A Modern Legal History of England and Wales, 1750-1950. London,1980.

Marshall, A. 'The Future of the Working Classes' The Eagle, [St.John's College Magazine] 9, 1875, 1-23.

---------- 'The Present State of Political Economy' Times 2 June 1885.

---------- Principles of Economics. 6th edn. London,1910.

---------- 'Alcoholism and Efficiency', letter to the Times 19 August 1910.

Mill, J.S., Principles of Political Economy. London,1848.

Mishan, E.J., 'Reflections on Recent Developments in the Concept of External Effects ' in Welfare Economics: Ten Introductory Essays. New York, 1964, 218-223.

---------- 'Pareto Optimality and the Law' Oxford Economic Papers, 19, 1967, 255-67.

Monteverde, K. and David Teece 'Appropriable rents and quasi-vertical integration' Journal of Law and Economics, 25, (1982), 321-328.

Morse, C. 'History of the Common Law Theory of Contract' Canada Law Journal, 39, (1903), 379-395.

Mumey, G.A. 'The 'Coase Theorem', a reexamination' Quarterly Journal of Economics, 85, (1971), 718-23.

Nicholas, S., 'The hierarchical division of labour and the growth of British manufacturing multinationals: 1870-1939' in Alice Teichova, Maurice Levy Leboyer and Helga Nussbaum eds., Multinational Enterprise in Historical Perspective. Cambridge,1986, 241-256.

North, D.C. 'Beyond the New Economic History' Journal of Economic History, 34,1974, 1-7.

---------- 'Governments,Voluntary Organisations and Economic Life: The Preindustrial Development of Western Europe' in Svetozar Pejovich ed., The Codetermination Movement in the West: Labour Participation in the Management of Business Firms. Lexington,Mass.,1978, 115-129.

---------- 'Structure and Performance: The Task of Economic History' Journal of Economic Literature, 16,1978, 963-78.

---------- Structure and Change in Economic History. New York,1981.

---------- 'The Theoretical Tools of the Economic Historian' in Charles P.Kindleberger and Guido di Tella eds., Economics in the Long View: Essays in Honour of W.W.Rostow. vol.1 London, 1982, 15-26.

---------- 'Comment on Stigler and Friedland' Journal of Law and Economics, 26, (1983), 269-271.

---------- 'Governments and the Costs of Exchange in History' Journal of Economic History, 44, (1984), 255-264.

---------- 'Transactions Costs ,Institutions and Economic History' Zeitschrift fur die gesamte Staatswissenschaft, 140,1984, .

---------- 'Institutions, transaction costs and economic growth' Economic Inquiry, 25,1987, 419-428.

---------- and Robert Paul Thomas The Rise of the Western World:A New Economic History. Cambridge,1973.

---------- and Robert Paul Thomas 'Comment' Journal of Economic History, 35, (1975), 19.

---------- and John Wallis 'Measuring the Transaction Sector in the American Economy,1870-1970' in Stanley L.Engerman and Robert E.Gallman ed Long Term Factors in American Economic Growth. Chicago,1986, 95-161.

[Nottingham] Records of the Borough of Nottingham being a series of extracts from the Archives of the Corporation of Nottingham Volume VIII: 1800-1835. Nottingham,1952.

Nutzinger, H.G. 'The Economics of Property Rights - A New Paradigm in Social Science ?'in W.Stegmuller, W.Balzer and W.Spohn eds., Philosophy of Economics: Proceedings, Munich, July 1981. Berlin,1982, 160-90.

Opp, K.D. 'The Emergence and Effects of Social Norms.A Confrontation of Some Hypotheses of Sociology and Economics' Kyklos, 32,1979, 775-801.

---------- 'The Economic Theory of Social Norms 'Property Rights' and the Role of Social Structures and Institutions' Archiv fur Rechts- und Sozialphilosophie, 67,1981, 344-359.

Patterson, A.T. ed.,A Selection from the Southampton Corporation Journals, 1815-35 and Borough Council Minutes, 1835-47. Southampton,1965.

---------- Radical Leicester: A History of Leicester, 1780-1850. Leicester, 1954.

Payne, P.L. 'The Uses of Business History: A Contribution to the Discussion' Business History, 5, (1962-4), 11-21.

---------- 'Industrial Entrepreneurship and Management in Great Britain' in M.M. Postan and Peter Mathias eds The Cambridge Economic History of Europe. volume VII, part 1 Cambridge,1978, 180-230.

Pejovich, S. 'Towards a General Theory of Property Rights' Zeitschrift fur Nationaloekonomie, 31, (1971), 141-155.

Perkin, H.,The Origins of Modern English Society, 1780-1880. London,1969.

Pigou, A.C., Wealth and Welfare. London, 1912.

---------- ed Memorials of Alfred Marshall. London,1925.

Pollard, S., 'Transaction Costs,Institutions and Economic Growth: A Comment' Zeitschrift fur die gesamte Staatswissenschaft, 140,1984, .

Pritchard, A.M., 'Tenancy By Estoppel' Law Quarterly Review, 80, (1964), 370-398.

Sir Leon Radzinowicz A History of English Criminal Law and Its Administration. 45 vols. to date, London,1956-.

Randall, A. 'Market Solutions to Externality Problems: Theory and Practice' American Journal of Agricultural Economics, 54, (1971), 175-183.

---------- 'Coasian Externality Theory in a Policy Context' Natural Resources Journal, 14, (1974), 35-54.

---------- 'Property Rights and Social Microeconomics' Natural Resources Journal, 15, (1975), 729-47.

---------- 'Property Institutions and Economic Behaviour' Journal of Economic Issues, 1, (1978), 1-21.

Rees, J.F., 'Recent Trends in Economic History' History, 43, 120, (1949), 1-14.

Regan, D. 'The Problem of Social Cost Revisited' Journal of Law and Economics, 15, (1972), 427-37.

Repullo, R. 'The existence of equilibrium without free disposal in economies with transaction costs and incomplete markets' International Economic Review, 28, (1987), 275-290.

Richmond, L., Company Archives: The Survey of the Records of 1000 of the First Registered Companies in England and Wales. Aldershot,1986.

Riordan, M.H. and Oliver E.Williamson 'Asset Specificity and Economic Organisation' International Journal of Industrial Organisation, 3, 1985, 365-78.

Rogers, J.E.T., The Economic Interpretation of History. London,1888.

Roll, E., A History of Economic Thought. 2nd edn., London,1961.

Rostow, W.W., '[Review of] Structure and Change in Economic History'Business History Review, 56 (1982), 301.

Rowley, C.K. and A.T. Peacock Welfare Economics: A liberal restatement. London,1975.

Rubin, G.R. and David Sugarman eds., Law, Economy and Society,1750-1914: Essays in the History of English Law. Abingdon,1984.

Samuels, W.J. 'Introduction: The Chicago School of Political Economy' Journal of Law and Economics, 14, (1971), 435-50.

---------- 'The Coase Theorem and the Study of Law and Economics' Natural Resources Journal, 14, (1974), 1-33.

---------- ed., The Methodology of Economic Thought. New Brunswick and London, (1980).

Samuelson, W. 'A Comment on the Coase Theorem' in Alvin Roth ed., Game-Theoretic Models of Bargaining. Cambridge,1985, 321-339.

Schmalensee, R., 'The new industrial organization and the analysis of modern markets' in W. Hildenbrand ed Advances in Economic Theory. Cambridge,1982, 253-285.

Schmoller, G., Max Lenz and Erich Marks Zu Bismarks Gedachtnis. Leipzig,1899.

von Schulze-Gaevernitz, G. Thomas Carlyles Welt- und Gesellschaftsanschauung. Dresden,1893.

Schumpeter, J.A.,History of Economic Analysis. New York,1954.

Schweitzer, A. 'Comparative Enterprise and Economic Systems' Explorations in Economic History, 7, (1969-70), 413-432.

Servian, M.S. 'The Fair Swindler of Blackheath: a Case Study on the Importance of Reputation in Late 18th Century Legal and Commercial Affairs' Journal of Legal History, 8, (1987).

Simmonds, N.E., The decline of juridical reason: doctrine and theory in the legal order. Manchester,1984.

Simpson, A.W.B. 'Innovation in Nineteenth Century Contract Law ' Law Quarterly Review, 91,1975, 275-302.

---------- The History of Contract Law: The Rise of Assumpsit. Oxford,1976.

---------- 'The Horwitz thesis and the history of contracts' University of Chicago Law Review, 46, (1979), 533-601.

---------- 'Contract: The Twitching Corpse' Oxford Journal of Legal Studies, 1, (1981), 265-277.

Smith, V. 'The Lewes Market' Sussex Archaeological Collections, 107,1969, 87-101.

------ ed.,The Town Book of Lewes 1702-1837. Lewes,1973.

Spaul, J.E.H. ed Andover Archives: The Bailiwick 1599-1835. Andover, 1971.

Starr, R.M. 'Equilibrium with non-convex transaction costs: monetary and non-monetary economies' Review of Economic Studies, 43, (1976), 195-215.

Steer, F.W. ed Minute Book of the Common Council of the City of Chichester 1783-1826. Sussex Record Society series, vol. 62 Lewes,1962.

---------- The Market House, Chichester. Chichester, 1962.

Street, T.A., The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law, Volume II: History and Theory of English Contract Law. Northport,N.Y.,1906.

Supple, B.E. ed., Essays in British Business History. Oxford,1977.

Sutch, R. 'Douglass North and the New Economic History' in Roger Ransom, Richard Sutch and Gary M. Walton eds., Explorations in the New Economic History. New York and London,1982 , 13-38.

Sydney, W.C., England and the English in the Eighteenth Century: Chapters in the Social History of the Times. London,1891.

Tawney, R.H., Religion and the Rise of Capitalism. London,1926.

Taylor, J. 'Charles Fowler: Master of Markets' Architectural Review, 135, (1964), 174-182.

---------- 'Charles Fowler (1792-1867): a centenary memoir' Architectural History, 11, (1968), 57-74.

Teece, D. 'Toward an economic theory of the multiproduct firm' Journal of Economic Behaviour and Organisation, 3, (1982), 39-63.

Temin,P. 'The Future of the New Economic History' Journal of Interdisciplinary History, 12, (1981), 179-97.

Thompson, E.P. The Making of the Emglish Working Class. 2nd edn. Harmondsworth, 1968.

---------- 'The moral economy of the English crowd' Past and Present, 50, (1971), 76-136.

---------- 'Patrician society, plebian culture' Journal of Social, History 7, (1973), 382-405.

Treitel, G.H., Doctrine and Discretion in the Law of Contract: An Inaugural Lecture delivered before the University of Oxford. Oxford,1981.

Ulph, A.M. and D.T.Ulph 'Transaction Costs in General Equilibrium Theory - A Survey ' Economica, 43, (1975), 355-72.

U.S. Department of Commerce and Labor, Bureau of Manufactures Municipal Markets and Slaughterhouses in Europe. Special Consular Reports, vol. 42 no. 3 Washington,1910.

Viikari, M., Die Krise der 'Historistischen' Geschictsschreibung und die Geschictsmethodologie Karl Lamprechts. Helsinki,1977.

Watson-Grice, J., National and Local Finance : A Review of the Relations between the Central and Local Authorities in England, France, Belgium and Prussia during the Nineteenth century. London,1910.

Webb, S., The London Programme. London,1891.

Weimar, R., 'Okonomisch-okologische Jurisprudenz - der nachste Schritt ?' Rechtstheorie: Zeitschrift fur Logik, Kybernetik und Soziologie des Rechts, 15, (1984), 313-332.

Wellisz, S., 'On external diseconomies and the government-assisted invisible hand' Economica, 31, (1964), 345-62.

White, B.D., A History of the Corporation of Liverpool, 1835-1914. Liverpool,1951.

Wicks, J., Consideration in the Law of Simple Contract. London,1939.

Wiles, R.M., 'Crowd Pleasing Spectacles in Eighteenth Century England' Journal of Popular Culture, 1, (1967), 90-105.

Williamson, O., 'The vertical integration of production: market failure

considerations' American Economic Review, 61, (1971), 112-123.

---------- 'Markets and hierarchies: some elementary considerations' American Economic Review, 63, (1973), 316-25.

---------- Markets and Hierarchies: Analysis and Antitrust Implications. New York,1975

---------- 'Transaction Cost Economics: The Governance of Contractual Relations' Journal of Law and Economics, 22, (1979), 233-261.

---------- 'Contract analysis: the transaction cost approach' in Paul Burrows and Cento Veljanovski eds The Economic Approach to Law. London,1981, 39-61.

---------- 'The modern corporation: origins, evolution and attributes' Journal of Economic Literature, 19, (1981), 1537-68.

---------- 'Corporate Governance' Yale Law Review, 93, (1984),1197-1230.

---------- The Economic Institutions of Capitalism: Firms, markets, relational contracting New York,1985.

Williston, S. 'Consideration in bilateral contracts' Harvard Law Review 27, (1914), 503-529.

Woj, C. 'Property Rights Disputes: Current Fallacies and a New Approach'

Journal of Legal Studies 14, 2, (1985), 411-423.

6.2 THESES AND DISSERTATIONS

Abecassis, J.M., 'The Development of the Trust as a Form of Agricultural Land Ownership in England' Cambridge University, Ph.D. dissertation, 1980.

Archer, H.J., 'An eclectic approach to the historical study of U.K. multinational enterprises', Reading University, Ph.D. dissertation, 1986.

Gunstone, D.P., 'Stewardship and Landed Society: A Study of the Stewards of the Longleat Estate' Exeter University, M.A. dissertation, 1972.

Mitchell, S.I., 'Urban markets and retail distribution, 1730-1815 with particular reference to Macclesfield, Stockport and Chester' Oxford University, D.Phil. dissertation, 1974.

Thwaites, W., 'The Marketing of Agricultural produce in Eighteenth Century Oxfordshire' Birmingham University, Ph.D. dissertation,1981.

Worcester, D.K., 'East Sussex Landownership: The Structure of Rural Society in an Area of Old Enclosure, 1733-87' Cambridge University, Ph.D. dissertation, 1950.

6.3 OTHER UNPUBLISHED PAPERS

Childs, M., 'Aspects of Swindon's History' reprograph of typescript, revised edition 1973, Swindon LSL [no acc. no.].

Dyerson, R., 'Technical change implications for economic organisation in the CADCAM sector: a suggested transaction cost approach' , circulated TS, Department of Economics, Heriot-Watt University, May 1987.

Foreman-Peck, J., 'Neoclassical Institutional Economics and Long-Term Change in the West' Department of Economics, University of Newcastle, Discussion Paper 86-05 [1986].

Gray, M.A., 'Agriculture, War and Statistics: an assessment of the English 'Invasion Returns', 1796-1804', Department of Economics, Heriot-Watt University, working paper 86-02.

---------- 'Transaction costs and the history of the law of contract in England, 1750-1850' Department of Economics, Heriot-Watt University, Working Paper 86/7-03 [1987].

---------- 'Record management problems in the use of the 1796-1804 'Invasion Returns'.' given at the Second Annual conference of the Association for History and Computing, Westfield College, University of London, March 1987.

---------- 'Transaction costs, the Coase theorem and the study of economic history' mimeo Faculty of Jurisprudence, European University Institute, Florence, June 1987 and discussion paper, Heriot-Watt University.

---------- 'Property rights and transaction costs in rural southern England', Paper given to the Economic History Society Conference, Norwich, April, 1988.

---------- 'Markets and hierarchies in eighteenth and nineteenth century England' Paper given at St. Anthony's College, Oxford, March 1989.

Hoffman, E. and Mokyr, J., 'Peasants, potatoes and Poverty: Transaction Costs in Pre-famine Ireland' Center for Mathematical Studies in Economics and Management Science, Northwestern University, discussion paper, 474, [1981].

Kay, N.M., 'Markets and false hierarchies: some problems in transaction cost economics' European University Institute Working Paper No.87/282 [1987].